Supreme Court, U.S.
FILED

97 1509 MAR 13 1998

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
AND GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

-VS-

PARIS HOYT CARRIGER,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

JOSEPH T. MAZIARZ
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

38 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit Court of Appeals en banc held that a state judge's finding regarding the credibility of a witness' repudiated recantation of his trial testimony was not entitled to the 28 U.S.C § 2254(d) presumption of correctness because, after purporting to review the state court record, the court concluded that "each piece of evidence is as consistent" with the witness' recantation as it is with his trial testimony so that the state judge's credibility finding was "not fairly supported by the record as a whole." The en banc court then accepted the repudiated recantation and concluded that Carriger had met the *Schlup v. Delo*, 513 U.S. 298 (1995) "fundamental miscarriage of justice" ("actual innocence") standard to allow the court to review otherwise abusive or procedurally defaulted constitutional claims. The en banc court then considered a constitutional claim unattached to the "actual innocence" showing, concluding that the State of Arizona committed a *Brady* violation by failing to obtain from a government agency, not involved in the investigation or prosecution of the case, a witness' prison file and turn over to the defense information in the file that might have been used to impeach the witness' trial testimony—even though the defense knew of the existence of the file but failed to request or obtain it. This case presents the following questions:

1. Whether the en banc court's methodology in stripping away the 28 U.S.C. § 2254(d) presumption of correctness from the state judge's credibility finding violates the statute, is inconsistent with this Court's caselaw, and will seriously undermine the deference given state court factual findings by federal courts within the Ninth Circuit?

2. Whether the en banc court misconstrued and misapplied this Court's recent decision in *Schlup* by utilizing inherently unreliable evidence to meet the *Schlup* "actual innocence" standard, refusing to consider new reliable evidence that establishes Carriger's guilt, lowering the *Schlup* standard to a "confidence in the verdict" standard, then reviewing the merits of a constitutional claim unattached to the showing of "actual innocence"?

3. Whether the en banc court erred, and created a circuit split, in holding that the prosecution must obtain from a government agency, not involved in the investigation or prosecution of the case, material that might be used to impeach a witness, and turn the material over to the defense, even if the defense has actual knowledge of the existence of the material?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINION BELOW vii

STATEMENT OF JURISDICTION viii

PROVISIONS INVOLVED ix

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 6

I

THE EN BANC COURT'S REFUSAL TO DEFER TO THE STATE COURT JUDGE'S DETERMINATION OF WITNESS CREDIBILITY DIRECTLY CONFLICTS WITH WELL-ESTABLISHED PRECEDENT OF THIS COURT AND WILL SERIOUSLY UNDERMINE THE DEFERENCE GIVEN STATE COURT FACTUAL FINDINGS BY FEDERAL COURTS WITHIN THE NINTH CIRCUIT. 6

II

THE EN BANC COURT UTILIZED INHERENTLY UNRELIABLE EVIDENCE TO UNLOCK THE *SCHLUP* "GATEWAY," REFUSED TO CONSIDER RELIABLE NEW EVIDENCE THAT ESTABLISHES CARRIGER'S GUILT, AND LOWERED THE *SCHLUP* ACTUAL INNOCENCE STANDARD AND APPLIED IT IN A MANNER THAT WILL TURN THE *SCHLUP* "GATEWAY" INTO A FLOODGATE. 13

III

THE EN BANC COURT'S HOLDING THAT A PROSECUTOR MUST OBTAIN, REVIEW, AND PROVIDE TO THE DEFENSE, INFORMATION OF WHICH THE DEFENSE HAS ACTUAL KNOWLEDGE IS INCONSISTENT WITH *BRADY* AND ITS PROGENY AND CONFLICTS WITH THE LAW OF THE OTHER FEDERAL CIRCUIT COURTS. 24

CONCLUSION 27

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

APPENDIX E E-1

APPENDIX F F-1

APPENDIX G G-1

APPENDIX H H-1

TABLE OF AUTHORITIES

CASES	PAGE
Anderson v. Bessemer City, 470 U.S. 564 (1985)	13
Battle v. Delo, 64 F.3d 347 (8th Cir. 1995)	7
Boyd v. Boyd, 169 N.E. 632 (N.Y. 1930)	10
Brady v. Maryland, 373 U.S. 83 (1963)	24
Carriger v. Lewis (Carriger IV), 948 F.2d 588 (9th Cir. 1991)	4
Carriger v. Lewis (Carriger V), 971 F.2d 329 (9th Cir. 1992)	4
Carriger v. Stewart, 95 F.3d 755 (1995)	5
Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997)	22
Hampton v. United States, 504 F.2d 600 (10th Cir. 1974)	26
Hernandez v. New York, 500 U.S. 352 (1991)	7
Herrera v. Collins, 506 U.S. 390 (1993)	5, 22
Kandiel v. United States, 964 F.2d 794 (8th Cir. 1992)	15
Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995)	25
Lindh v. Murphy, 117 S. Ct. 2059 (1997)	7
Lindsey v. United States, 368 F.2d 633 (9th Cir. 1966)	15
Maggio v. Fulford, 462 U.S. 111 (1983)	7
Marshall v. Lonberger, 459 U.S. 422 (1983)	7, 10, 12
McCleskey v. Zant, 499 U.S. 467 (1991)	23
McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996)	12
Murray v. Carrier, 477 U.S. 478 (1986)	14
O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996)	24
Olson v. United States, 989 F.2d 229 (7th Cir. 1993)	15
Parke v. Raley, 506 U.S. 20 (1992)	7, 12
Patton v. Yount, 467 U.S. 1025 (1984)	7
Rector v. Johnson, 120 F.3d 551 (5th Cir. 1997)	26

Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994) 26
Sanders v. Sullivan, 863 F.2d 218 (2nd Cir. 1988) 15
Schlup v. Delo, 513 U.S. 298 (1995) 5, 15, 22, 23
State v. Carriger (Carriger I), 599 P.2d 788 (1979) 2
State v. Carriger (Carriger II), 645 P.2d 816 (1982) 3
State v. Carriger (Carriger III), 692 P.2d 991 (1984) 3, 17
State v. Krum, 903 P.2d 596 (Ariz. 1995) 15
Strickland v. Washington, 466 U.S. 668 (1984) 6
Sumner v. Mata, 455 U.S. 591 (1982) 7
Thompson v. Keohane, 516 U.S. 99 (1995) 5
United States v. Ahern, 612 F.2d 507 (10th Cir. 1980) 15
United States v. Bagley, 473 U.S. 667 (1985) 25
United States v. Chambers, 944 F.2d 1253 (6th Cir. 1991) 15
United States v. Clark 928 F.2d 733 (6th Cir. 1991) 26
United States v. Flores-Mireles, 112 F.3d 337 (8th Cir. 1997) 26
United States v. Glantz, 884 F.2d 1483 (1st. Cir. 1989) 15
United States v. Gresham, 118 F.3d 258 (5th Cir. 1997) 15
United States v. Iverson, 648 F.2d 737 (D.C. Cir. 1981) 26
United States v. Johnson, 487 F.2d 1278 (4th Cir. 1973) 15
United States v. Meinster, 619 F.2d 1041 (4th Cir. 1980) 26
United States v. Morris, 80 F.3d 1151 (7th Cir. 1996) 25, 26
United States v. Santiago, 837 F.2d 1545 (11th Cir. 1988) 15
United States v. Zagari, 111 F.3d 307 (2nd Cir. 1997) 26
Wainwright v. Goode, 464 U.S. 78 (1983) 12
Wainwright v. Witt, 469 U.S. 412 (1985) 7, 10

STATUTES

28 U.S.C. § 2254(d) 7, 8, 12-14, 18

28 U.S.C. § 2254(d)(8) 7, 12

28 U.S.C. § 2254(e)(1) 7

OTHER AUTHORITIES

Moore's Federal Practice § 633.05[2] (3d ed. 1997) 16

OPINION BELOW

The en banc opinion of the Ninth Circuit Court of Appeals is not yet published; a copy is included in Appendix A. The order of the district court is not published; it is included in Appendix C.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a writ of certiorari issue to review the en banc decision of the United States Court of Appeals for the Ninth Circuit issued on December 17, 1997. Petitioners have timely filed this petition for writ of certiorari within 90 days of the decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED

28 U.S.C. § 2254(d) (pre-1996 amendment):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by State court of competent jurisdiction in proceeding to which the application for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court, on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary in Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of

paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that he factual determination by the State court was erroneous.

28 U.S.C. § 22549(e)(1) (as amended 1996):

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

On March 15, 1978, Paris Hoyt Carriger (hereafter Carriger) was charged with the offenses of robbery and first-degree murder. The facts giving rise to the charges and subsequent convictions are as follows. Around 1970 Carriger met Robert Dunbar while they were incarcerated in Arizona State Prison, and the two became friends. Dunbar was released from prison in 1976. Carriger was released in late 1977.

On March 11, 1978, Carriger called Dunbar and asked if he could stay at Dunbar's home. Carriger told Dunbar that he would sleep outside in his van. Dunbar agreed and Carriger moved in on March 12, 1978.

On the morning of March 13, 1978, Carriger called his employer and told him that he would not be coming to work that day. He spent the rest of the morning and early afternoon with Dunbar. They purchased a gun, then went to Shaw's Jewelry Store, which was about 6 blocks from Dunbar's home. The owner, Robert Shaw, buffed some scratches out of the crystal on Dunbar's watch. After returning home, Dunbar took a nap around 4:00 p.m.. Carriger then left the Dunbar home in his van.

When Mr. Shaw had not arrived home by his normal time, his wife called the store, but received no answer. She later drove to the store, arriving at about 6:40 p.m. The store was in disarray. Mrs. Shaw found her husband's body lying on the floor at the rear of the store. Mr. Shaw had been brutally murdered. His skull had been crushed and his tie was knotted around his neck. A jeweler's ring sizer and a broken cast iron skillet were found near his head. His hands were bound behind his back with adhesive tape.

Carriger awoke Dunbar from his nap around 6:00 p.m. He and Dunbar went outside to Carriger's van. Carriger said that he had robbed the jewelry store, and showed Dunbar jewelry, watches, and rings. Dunbar helped remove the price tags from the jewelry. Carriger gave Dunbar some of the loot. He put the rest in an attache case, and he and Dunbar took that case and a gun case to the apartment of Dunbar's stepdaughter. Carriger handed the cases to Dunbar's stepdaughter

Dunbar then drove Carriger to various locations where he disposed of his clothes and other items. Carriger cut his name out of the pocket of the pants he had been wearing and threw them in the canal. Carriger told Dunbar he had pulled a gun on Mr. Shaw, tied him up, and then repeatedly beat him with a skillet and a "flat iron." When Mr. Shaw's heart would not stop beating, Carriger used the victim's tie to strangle him.

The following morning, Dunbar called the police. Officer Dan Barker received the call from Dunbar, who identified himself as "Bob," and asked

if the police would be interested in clearing up the jewelry store murder. Dunbar told Barker that he was an ex-con, that he had supplied the killer with a gun, and that he wanted immunity for a burglary he (and Carriger) had committed a few days earlier. Barker eventually set up a meeting between Dunbar and a detective.

Dunbar met with officers shortly after the phone call. He told them about Carriger's confession to the murder and helped arrange Carriger's arrest. Dunbar retraced the route he had taken the night before and helped the police recover Carriger's discarded clothing, as well as credit cards and personal papers that belonged to the victim. He also took the police to his stepdaughter's apartment, where she turned over the attache case and the gun case. The police seized Carriger's luggage, and retrieved Carriger's pants from the canal. All of the clothing recovered fit Carriger. The shoes had blood on them. Pairs of pants found in Carriger's luggage had Carriger's name on the inside of the pockets. The pants retrieved form the canal were the same brand and size as the pairs found in Carriger's luggage and the pocket was cut where Carriger's name would have been.

Carriger had shaved his head just before his arrest. He had two keys in his possession when arrested. One unlocked the Dunbar residence and the other unlocked the attache case that contained the stolen jewelry.

An officer present at the autopsy cut the wad of tape from Mr. Shaw's hands and, using forceps, placed it in a container. An identification technician dusted the outside of the tape wad with fingerprint powder and found one latent print. He removed the piece of tape bearing the print and put it on a lift card. The latent print was matched to Carriger's right thumb. Carriger's prints were also found on the gun case, and on a gun slick and a piece of paper inside the case.

Following a jury trial, Carriger was convicted of robbery and first-degree murder. The trial court (Honorable Dorothy Carson) held an aggravation-mitigation hearing, found two aggravating circumstances (Carriger's prior conviction for a crime of violence and the especially heinous, cruel or depraved nature of the murder), and no mitigating circumstances sufficiently substantial to call for leniency. It then sentenced Carriger to prison for not less than 99 years nor more than 100 years for the robbery and imposed a death sentence for the murder. The Arizona Supreme Court affirmed Carriger's convictions and sentences on direct appeal. *State v. Carriger (Carriger I)*, 599 P.2d 788 (1979)

On September 29, 1981, Carriger filed a petition for post-conviction relief in the trial court, raising several claims, including the claim that trial counsel were ineffective in failing to obtain Robert Dunbar's Arizona Department of Corrections (DOC) file to obtain impeachment material. The

trial court summarily dismissed the petition and denied a motion for rehearing. Carriger petitioned the Arizona Supreme Court for review. The Arizona Supreme Court held that Carriger had been denied effective assistance of counsel at sentencing. It remanded the matter to the trial court for resentencing and for consideration of any issues properly raised in the petition. *State v. Carriger (Carriger II)*, 645 P.2d 816 (1982).

The trial court gave Carriger the opportunity to present evidence to support his claims and conducted a resentencing. At the conclusion of the hearing, the trial court denied relief on the remaining claims. It again sentenced Carriger to death for the murder and to a prison term of not less than 99 years nor more than 100 years for the robbery. The Arizona Supreme Court affirmed Carriger's sentences as well as the denial of post-conviction relief. *State v. Carriger (Carriger III)*, 692 P.2d 991 (1984)

On July 5, 1985, Carriger filed a petition for writ of habeas corpus in federal district court. On July 5, 1986, the district court denied the petition. Carriger's appeal to the Ninth Circuit was stayed.

On September 25, 1986, Carriger filed his second petition for post-conviction relief in state court. Because Judge Carson had retired, the matter was assigned to the Honorable Michael Ryan. During the course of a 6-day evidentiary hearing, Joyce Dunbar (Stevens), who had since divorced Robert Dunbar, recanted her trial testimony and testified that Dunbar told her that he and Carriger robbed the jewelry store and killed Robert Shaw. Initially, Dunbar testified that his trial testimony was truthful. Dunbar later recanted, testifying that he and Joyce had robbed the jewelry store and killed Robert Shaw. However, Dunbar's recantation was short-lived, for he then testified that he had lied to get even with Joyce and to embarrass the Arizona Attorney General's Office, the Maricopa County Attorney's Office, and the Phoenix Police Department because none of these entities would help him out in prison. Several other witnesses testified, but their testimony was cumulative to testimony or evidence presented at trial or during the first post-conviction relief proceeding.

After hearing all of the testimony and considering all of the evidence presented, Judge Ryan denied the petition for post-conviction relief. (Appendix D) After rejecting the veracity of Joyce Stevens' testimony, Judge Ryan found that, even if her testimony, and the testimony of the other witnesses, was "believed in its entirety," it would merely indicate that Dunbar may have participated in the robbery and murder but would "not exonerate or mitigate [Carriger's] role in the murder." (*Id.* at 2, 6) Judge Ryan also stated that he disbelieved the short-lived recantation testimony of Robert Dunbar, finding it "clearly incredible." (*Id.* at 3) He found that "the evidence plainly establishes [Carriger's] guilt." (*Id.*) Judge

Ryan denied Carriger's motion for rehearing (Appendix E) and the Arizona Supreme Court denied his petition for review.

On November 4, 1991, a three-judge panel of the Ninth Circuit Court of Appeals issued an opinion affirming the district court's denial of habeas corpus relief. *Carriger v. Lewis (Carriger IV)*, 948 F.2d 588 (9th Cir. 1991) The Ninth Circuit subsequently granted rehearing en banc. On July 28, 1992, an 11-judge en banc panel of the court, with three judges dissenting, again affirmed the district court's denial of habeas corpus relief. *Carriger v. Lewis (Carriger V)*, 971 F.2d 329 (9th Cir. 1992)

On February 4, 1994, Carriger filed a third petition for post-conviction relief and subsequently obtained a stay of execution. On May 4, 1994, Judge Ryan issued a detailed order dismissing the petition on the grounds that the claims raised were not cognizable under state law in a successive petition for post-conviction relief and/or were precluded under state law, and that the claims did not fall within any of the exceptions (including newly discovered evidence) to non-cognizability or preclusion. (Appendix F) The trial court denied Carriger's motion for rehearing. (Appendix G) The Arizona Supreme Court denied his petition for review.

On August 8, 1995, Carriger filed a successive petition for writ of habeas corpus in federal district court. On November 2, 1995, the district court issued a memorandum of decision and order, denying the petition, as well as several ancillary motions Carriger had filed with the district court. (Appendix C) The district court held that: (1) Carriger's "actual innocence" claim failed to meet the *Carrier/Schlup* "gateway" standard; (2) Carriger's claim that the state courts on collateral review failed to recognize "new" evidence allegedly implicating Dunbar related to a state law question and the state court *did* reconsider Carriger's death sentence in light of the alleged "new" evidence; (3) Carriger's *Brady* claims constituted an abuse of the writ and, alternatively, were meritless; (4) Carriger's competency claims were abusive, procedurally defaulted, and alternatively, meritless; and (5) Carriger's ineffective assistance of counsel at resentencing claim was abusive, procedurally defaulted, personally waived, and alternatively, meritless to the extent it alleged ineffectiveness related to the competency issue. (*Id.*)

Carriger appealed and the district court issued a certificate of probable cause. The Arizona Supreme Court scheduled Carriger's execution for December 6, 1995.

On November 29, 1995, the original three-judge panel of the Ninth Circuit issued a per curiam order denying the motion for stay of execution and affirming the district court's denial of the successive petition for writ of habeas corpus for substantially the reasons stated in the district court's

memorandum of decision and order, which it attached to its order. On December 2, 1995, the panel issued an amended order sua sponte granting a stay of execution and ordering supplemental briefing on the applicability of this Court's just issued opinion in *Thompson v. Keohane*, 516 U.S. 99 (1995) to the state court's determination that Carriger failed to establish actual innocence as defined by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995). On September 10, 1996, the three-judge panel issued an opinion affirming the district court's denial of the petition for writ of habeas corpus. *Carriger v. Stewart (Carriger VI)*, 95 F.3d 755 (9th Cir. 1995) The Ninth Circuit granted rehearing en banc.

On December 17, 1997, the sharply divided en banc court issued its opinion. The six judge majority refused to defer to the Arizona trial judge's finding that Robert Dunbar was not credible when he recanted his trial testimony and claimed that he and his ex-wife had robbed and murdered the victim. (Appendix A at 24–30) The majority concluded that "each piece of evidence is as consistent with Dunbar's confession[1] as it is with his trial testimony" (*id.* at 26) and, therefore, in its view, "the state court's credibility determination is not fairly supported by the record as a whole." (Id. at 30) The majority accepted Dunbar's recantation, and considered it in conducting its review of the district court's rejection of Carriger's *Herrera* (*Herrera v. Collins*, 506 U.S. 390 (1993)) and *Schlup* claims. (*Id.* at 31–37)

The majority concluded that Carriger failed to establish a *Herrera* "freestanding claim of innocence" because Dunbar's short-lived recantation failed to establish "that Carriger more likely than not is innocent." (Appendix A at 31–34) The majority then held that Dunbar's recantation was sufficient to meet the *Schlup* "miscarriage of justice" standard, because, in the majority's view, although Carriger failed to "affirmatively prove his actual innocence," he had "more than shown sufficient doubt about the validity of his conviction to satisfy *Schlup* and permit consideration of his constitutional claims." (*Id.* at 34, 36) Having passed through the *Schlup* "gateway" to otherwise abusive and procedurally barred claims, the majority held that the State of Arizona had committed a *Brady* violation by failing to obtain, review, and hand over to the defense, Robert Dunbar's DOC file. (*Id.* at 37–45) The majority vacated the panel opinion, reversed the district court's judgment, and ordered the matter remanded to the district court with instructions to grant the writ. (*Id.* at 45)

---

1. Throughout its opinion, the majority refers to Dunbar's short-lived recantation as a "confession."

Judge Kozinski, writing for the five dissenting judges, took issue with "the majority's hopelessly one-sided review of the record" and its refusal to defer to the state court judge's factual determination that Robert Dunbar's short-lived recantation was "not credible," stating that "[t]he majority's methodology will seriously undermine the degree of deference federal courts in this circuit give to state court findings of fact in habeas proceedings." (Appendix B at 14–16)

The dissent also criticized the majority for holding that "[a] repudiated recantation" is the type of "reliable new evidence" sufficient to unlock the *Schlup* gateway (*id.* at 2) and that, if the majority decision were allowed to stand, the abuse of the writ doctrine "will be severely undermined," and "the *Schlup* gateway becomes a freeway off death row." (*Id.* at 6) The dissent called the majority to task for finding "unreliable" and giving "little weight" to new reliable evidence that "destroys Carriger's theory and provides strong proof that he was present and participated in the murder." (*Id.* at 18) And, the dissent pointed out that the majority "cuts the heart out of *Schlup*" by watering down the "actual innocence" standard articulated by this Court in *Schlup*, to a standard more akin to the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice standard (confidence in the verdict undermined). (*Id.* at 8)

Finally, the dissent pointed out that the majority's finding of a *Brady* violation was flawed because the defense knew of the existence of Dunbar's DOC file and "[t]he government need not give notice sua sponte where the accused has knowledge of the documents in question." (*Id.* at 22–23)

REASONS FOR GRANTING THE WRIT

I

THE EN BANC COURT'S REFUSAL TO DEFER TO THE STATE COURT JUDGE'S DETERMINATION OF WITNESS CREDIBILITY DIRECTLY CONFLICTS WITH WELL-ESTABLISHED PRECEDENT OF THIS COURT AND WILL SERIOUSLY UNDERMINE THE DEFERENCE GIVEN STATE COURT FACTUAL FINDINGS BY FEDERAL COURTS WITHIN THE NINTH CIRCUIT.

Perhaps the most disturbing aspect of the en banc majority's decision is the disparaging manner in which it treated the state trial judge's (Judge Ryan's) finding on the issue of credibility. After conducting a "hopelessly one-sided review of the record" (Appendix B at 17) and stating that "each piece of evidence is as consistent with Dunbar's confession as it is with his trial testimony" (Appendix A at 26), the majority dismissed Judge Ryan's

credibility determination as "not fairly supported by the record as a whole" and "not entitled to a presumption of correctness." (*Id.* at 30) The majority's methodology is a blueprint for federal judges, who are so inclined, to dispose with the 28 U.S.C. § 2254(d)[2] presumption of correctness in virtually any habeas case. If allowed to stand, it will wreak havoc throughout federal courts within the wide ambit of the Ninth Circuit.

Pursuant to 28 U.S.C. § 2254(d)(8) a state court's factual findings are "presumed to be correct" if "fairly supported by the record." This Court has held—time and again—that a state court's factual findings are entitled to a "high measure of deference." *E.g. Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 455 U.S. 591, 598 (1982) And, a determination of witness credibility is entitled "special deference." *Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *see also Wainwright v. Witt*, 469 U.S. 412, 428–29 (1985); *Maggio v. Fulford*, 462 U.S. 111, 113 (1983) State court findings of fact are entitled to *at least* as much deference on federal habeas corpus review as are district court factual findings, and probably more. *Witt*, 469 U.S. at 428; *Yount*, 467 U.S. at 1038; *see also Hernandez v. New York*, 500 U.S. 352, 369 (1991) ("It 'would pervert the concept of federalism to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings.'") In determining whether a state court's factual finding is "fairly supported by the record," a federal court *must defer* to the state court on all inferences fairly deduced from the record. *Parke v. Raley*, 506 U.S. 20, 35–36 (1992); *Lonberger*, 459 U.S. at 435. Further, "Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Lonberger*, 459 U S. at 434. As this Court aptly noted, "we greatly doubt that Congress, when it used the language 'fairly supported by the record' considered 'as a whole' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." *Id.* at 434–35; *See also Battle v. Delo*, 64 F.3d 347, 352–53 (8th Cir. 1995) (state judge's finding at post-conviction relief hearing that the testimony of another person who claimed

---

2. Because Carriger filed his successive habeas petition before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the court applied the statute as it existed prior to amendment. *See Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997). However, the majority's methodology and refusal to defer to the state court credibility finding applies with equal force to the post-AEDPA amended statute, 28 U.S.C. § 2254(e)(1).

to be the "real killer" was "incredible" binds federal courts pursuant to 28 U.S.C. § 2254(d) and the testimony is entitled to "no weight" in conducting a *Schlup* analysis)

In 1988, after presiding over a 6-day post-conviction relief evidentiary hearing, Judge Ryan made the following written factual findings regarding Robert Dunbar's testimony during the course of that proceeding:

> Robert Dunbar testified for the State in 1978. *At these hearings he testified on August 28, 1987, that he would testify as he did in 1978.* He denied Ms. Stevens' allegations. However, *on October 30, 1987, Dunbar without any grant of immunity and in the presence of his appointed counsel, testified that his 1978 testimony was false and that he and Joyce Stevens committed the robbery and murdered Mr. Shaw.*
>
> The testimony of Dunbar at the hearing on October 30, 1987, *was inconsistent with the physical evidence, testimony of other trial witnesses*, and his prior testimony. *On December 11, 1987, Dunbar, after receiving testimonial immunity, testified that the testimony he gave on October 30, 1987, was false.* He said he gave that testimony to get even with his ex-wife for her false testimony, and to embarrass the prosecution and police. Additionally, he said he wanted to try and make money by selling his story. *His desire to make money was confirmed by his attorney and Petitioner's attorney*. However, he did not stick to this story for long. As early as November 17, 1987, he wrote to the Court admitting testimony was false. He confirmed that on December 11, 1987.
>
> Dunbar's 1978 trial testimony is supported by the physical evidence and the testimony of other witnesses such as Jackie McCullar and Dennis Stevens. Crucial physical evidence linking Petitioner to the homicide includes his fingerprints on the tape binding the victim's hands, the attache case key found in Petitioner's property, the discarded clothes with the inside pockets removed where Carriger customarily placed his initials, Carriger's prints on the gun case, and the boots worn during the robbery which a number of witnesses in previous proceedings testified belonged to Petitioner. *The evidence plainly establishes Petitioner's guilt.*
>
> The theory of Petitioner that Dunbar planted most of the physical evidence as part of an elaborate scheme to frame Carriger is without merit. *It is obvious from these proceedings*

that Dunbar is not capable of either perpetrating or perpetuating such a scheme. He could not even stick to his claim that his trial testimony was false for more that a couple of weeks. What happened here confirms what the Supreme Court said in 1984: "[n]othing presented to this Court indicates Dunbar has the ability to conceive such a story and maintain it under questioning." 143 Ariz. at 151.

. . .

Dunbar's recantation of his trial testimony would probably not change the verdict. *The recanting testimony was in direct conflict with the physical evidence, the manner in which Shaw was murdered, and other testimony. Also, Dunbar later admitted that the recantation was a lie and he had done it for money and spite. The best that can be said is that Petitioner has shown this Court that Dunbar is a liar, albeit a poor* one. However, the Jury in 1978 knew Dunbar was a felon six times over who had spent time in prison, who was a liar, a thief, a burglar, and a witness who demanded a deal and immunity before he testified.

The evidence presented here is another attack on the credibility of Dunbar's trial testimony. This was addressed at the 1982 hearing for Post-Conviction Relief with evidence that was in existence at the time of the trial. The evidence here in large part consists of statements and acts occurring years after the trial.

Dunbar's testimony at the trial in 1978 was corroborated by physical evidence and testimony from other sources. *Nothing here refutes that to the point it would affect the verdict.*

. . .

The evidence shows the murder was committed by Carriger; Dunbar's recantation is simply unbelievable. The testimony of the other witnesses even if believed in its entirety indicates Dunbar was there and may have participated in the robbery and homicide. However, it does not exonerate or mitigate Petitioner's role in the murder of Mr. Shaw.
(Appendix D at 2, 5, 6, emphasis added).

The majority began its attack of Judge Ryan's credibility determination by stating that he "had not been the trial judge" (Appendix A at 25), as if this somehow entitled his finding to less deference. What the majority conveniently ignored, however, is that Judge Ryan *saw and heard* Dunbar testify on August 28, 1987, that his trial testimony had been truthful, *saw and heard* Dunbar testify on October 30, 1987, that his trial testimony was not truthful and that he and his ex-wife had committed the

murder, then *saw and heard* Dunbar testify on December 11, 1987, that his recantation ("confession") was false and that his trial testimony had been truthful. (Appendix D at 2-3) As this Court has stated on a couple of occasions:

> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . .To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.

Witt, 469 U.S. at 434, quoting *Boyd v. Boyd*, 169 N.E. 632, 634 (N.Y. 1930); *Lonberger*, 459 U.S. at 434, quoting *Boyd*.

Next, the majority seizes upon Judge Ryan's statement that Dunbar's trial testimony was more consistent with the physical evidence than was his short-lived recantation, erroneously stating that Judge Ryan's evaluation of Dunbar's credibility was solely "based on [Judge Ryan's] conclusions that the physical evidence at trial was consistent with Dunbar's trial testimony and inconsistent with his confession, and that Dunbar had motivations to lie in 1987." (Appenix A at 25-26)[3] While Judge Ryan certainly based his credibility determination, in part, on these two factors, he *also* based it upon the "testimony of other witnesses," Dunbar's inability to maintain a lie for very long—let alone perpetrate and perpetuate the type of frame-up alleged by Carriger, the fact that Dunbar's recantation included the assertion that he *and his ex-wife* committed the murder, and, most importantly, his personal observations of Dunbar when he testified before him and gave the conflicting testimony. (Appendix D at 2-3, 5) The majority simply ignored these additional factors.

The majority then proceeded to review the physical evidence through a Carriger-colored prism, attempting to compartmentalize and explain away each individual piece of evidence by drawing inferences (some far-fetched)

---

3. It is particularly troubling that the majority attempts to strip away the presumption of correctness by nit-picking at Judge Ryan's detailed written order. The 28 U.S.C. § 2254(d) presumption of correctness does *not* require any sort of written findings by the state court. *Witt*, 469 U.S. at 430. Had Judge Ryan simply said, "I did not believe Dunbar when he recanted his trial testimony," presumably the majority would have no ammunition to attempt to shoot down the presumption of correctness. It defies logic to allow the presumption of correctness to be stripped away because the trial judge took the time and effort to more fully explain the basis of his finding.

most favorable to Carriger. (Appendix A at 26–30) As noted by the dissent:

> The majority draws each inference in favor of Carriger. It begins by discarding the physical evidence, finding that: Carriger could not have left only one fingerprint on the tape while binding Shaw's hands, maj. op. at 14638; Carriger's having the key to the attache case meant nothing, Id. at 14639; Dunbar wore Carriger's clothes during the robbery, *Id.* at 14639; Dunbar planted Carriger's jeans in the canal, *Id.* at 14640; Carriger's fingerprints on the gun case meant nothing. *Id.* at 14640; Dunbar wore Carriger's boots. *Id.* at 14640; and Carriger would have left recoverable fingerprints on the jewelry had he not worn gloves. *Id.* at 14640. The majority then moves on to even more speculative matters, finding that: Dunbar could not have known the details of the crime unless he participated. *Id.* at 14641; Dunbar was not shown diagrams of the store; *Id.* at 14641; Dunbar's lawyer was not interested in publicity. *Id.* at 14641; Dunbar was vague and evasive when recanting his confession. *Id.* in 14641–42. None of these findings had been made before in the twenty-year history of this case. and each is used to support the majority's most speculative (and contradictory) findings of all: that Dunbar was telling the truth when he confessed. *Id.* at 14642, and that he acted alone. *id.* at 14634 n.1. *The role of the factfinders in our criminal and habeas systems demands more respect than this.*

(Appendix B at 16 n.13, emphasis added).

In addition to viewing the record, and drawing all inferences, in the light most favorable to Carriger, the majority failed to even recognize that portion of Dunbar's recantation that puts the lie to it—Dunbar's claim that he and his ex-wife (not Carriger) committed the robbery and murder.

> Dunbar's confession helps Carriger only if we think that all twelve imaginary jurors would swallow the preposterous tale that Dunbar and Joyce robbed and killed Robert Shaw together. Yet the record lacks even a sliver of support for this fantasy: There is no physical evidence of her involvement and she has an alibi. *Absolutely no one—Carriger himself included—takes this part of Dunbar's confession seriously.*
>
> Joyce's participation is not a side show—a trivial detail that can be shrugged off. So far as Carriger is concerned, this is the meat of the coconut. Let's say Dunbar was there, that he

> participated in the robbery, that he wielded the lethal frying pan. *See* maj. op. at 14641. None of this proves Carriger *wasn't* there. The only part of Dunbar's confession that exonerates Carriger is where he claims it was Joyce (not Carriger) who was his accomplice. And for that part we have only Dunbar's unadorned words—the fabrication of a proven liar.

(*Id.* at 10–11, emphasis original in part, added in part) Thus, not only did the majority draw every conceivable inference (and some inconceivable ones) in favor of Carriger, it picked from Dunbar's "confession" only those portions that supported its desired result.

The majority's one-sided review of the state court record, and its insistence upon drawing every inference adverse to Judge Ryan's credibility determination, leaves the 28 U.S.C. §2254(d) presumption of correctness "in tatters." (Appendix B at 22) It also conflicts with this Court's well-established caselaw. *E.g. Raley*, 506 U.S. at 35–36 (federal court must defer to state court on all inferences reasonably drawn from the record); *Lonberger*, 459 U.S. at 432–35 (before rejecting a state court's factual determination, a federal court "must conclude that the state court's findings lacked even 'fair support' in the record," including "inferences fairly deducible" from the record).

However, even accepting the majority's one-sided view of the state court record, it still erred in stripping away the presumption of correctness from Judge Ryan's credibility determination. The majority concluded that "each piece of evidence is *as consistent*" with Dunbar's confession as it is with his trial testimony." (Appendix A at 26, emphasis added) Accepting the majority's findings, Judge Ryan's credibility determination has to be, as a matter of law, "fairly supported by the record." *Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (when two contrary conclusions "find fair support in the record" a federal court must defer to the state court's finding pursuant to 28 U.S.C. §2254(d)(8)); *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996) (citing *Goode* and holding that where state court findings "have support in the record" a federal court must defer, even though it "might have rendered contrary findings that also would have support in the record") In finding that a *federal* circuit court of appeals had erred in overturning a *federal* district court's factual finding, this Court stated:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence

> differently. *Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous*.
>
> This is so *even when the district court's findings do not rest on credibility determinations*, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985) (emphasis added, citation omitted) The factual finding here is purely a question of credibility. Thus, Judge Ryan's credibility determination is most certainly "fairly supported by the record" and the majority erred in stripping away the 28 U.S.C. §2254(d) presumption of correctness.

The majority's methodology in stripping away the 28 U.S.C. § 2254(d) presumption of correctness is so out of line with this Court's well-established caselaw that one would think that other federal courts would simply shun it. Unfortunately, it is an en banc decision, which binds all federal courts within the ambit of the Ninth Circuit. Therefore, as pointed out by the dissent, it "will seriously undermine the degree of deference federal courts in this circuit give to state court findings of fact in habeas proceedings." (Appendix B at 14–15) This Court must grant certiorari to bring the Ninth Circuit back in line with the rest of the federal judiciary on this important issue.

II.

THE EN BANC COURT UTILIZED INHERENTLY UNRELIABLE EVIDENCE TO UNLOCK THE *SCHLUP* "GATEWAY," REFUSED TO CONSIDER RELIABLE NEW EVIDENCE THAT ESTABLISHES CARRIGER'S GUILT, AND LOWERED THE *SCHLUP* ACTUAL INNOCENCE STANDARD AND APPLIED IT IN A MANNER THAT WILL TURN THE *SCHLUP* "GATEWAY" INTO A FLOODGATE.

After accepting and giving weight to Dunbar's short-lived recantation,[4] the majority found that Carriger failed to establish a *Herrera* claim (Appendix A at 31–34), but did meet the *Schlup* "gateway" actual innocence standard. (*Id.* at 34–37) The majority erred in four crucial respects: (1) it utilized inherently unreliable recantation testimony (which itself was subsequently recanted) to unlock the *Schlup* gateway; (2) it failed to consider new reliable evidence that establishes Carriger's guilt beyond

---

4. If the majority had deferred to the state court judge's finding on the credibility of Dunbar's recantation, the *Schlup* gateway would necessarily be slammed shut because the remaining "new evidence" offered by Carriger does not come close to meeting even the majority's watered-down *Schlup* standard. (See Appendix A at 34–36; Appendix C at 8–15.)

any doubt; (3) it effectively lowered the *Schlup* actual innocence standard to a "confidence in the verdict" standard; and (4) it then went on to review a federal claim unattached to the purported "actual innocence" claim. If allowed to stand, the en banc decision will wreak havoc, not only in federal courts within the Ninth Circuit, but in federal courts across the nation. Moreover, this Court should seize the opportunity to clarify *Schlup* and provide guidance to federal courts nationwide faced with ever increasing *Schlup* claims.

In *Schlup* this Court held that the *Murray v. Carrier*, 477 U.S. 478 (1986) "fundamental miscarriage of justice" standard applied to allow federal district courts to review an otherwise abusive or procedurally barred federal constitutional claim where the "constitutional error has caused the conviction of an innocent person." 513 U.S. at 324. The Court held that only "new reliable evidence" would suffice to meet this standard. *Id.* The Court stated that to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" the habeas petitioner "must show that it is more likely than not that *no* reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327, quoting *Carrier*, 477 U.S. at 496 (emphasis added) The Court stressed that the *Carrier* standard" is intended to focus the inquiry on actual innocence," and that district courts were to "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327-28. The Court further noted that "a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to convict him beyond a reasonable doubt." *Id.* at 329. The Court did *not* address the issue of whether a federal district court was *required* to reach the merits of the alleged constitutional error if it found that the petitioner had satisfied the *Carrier* actual innocence standard. *Id.* at 333 (O'Connor, J., concurring) ("the Court does not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy").

A. A REPUDIATED RECANTATION IS NOT "NEW RELIABLE EVIDENCE."

The majority fails to acknowledge the essential element of a *Schlup* "actual innocence" claim—that the new evidence must be reliable. This Court was very clear that *reliability* was the essential elem*enthlup* claim:

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new *reliable* evidence—whether it be *exculpatory scientific evidence, trustworthy*

eyewitness accounts, or critical *physical evidence*—that was not presented at trial.

513 U.S. at 324 (emphasis added) The Court noted that societal interests in finality, comity, and the conservation of scarce judicial resources demanded that only "new reliable evidence" was sufficient to unlock the *Schlup* gateway "[b]ecause such evidence is obviously unavailable in the vast majority of cases" and, therefore, "claims of actual innocence are rarely successful." *Id.*

Dunbar's repudiated recantation is certainly not "scientific evidence" or "critical physical evidence"; nor is it a "trustworthy eyewitness account[ ]." *Schlup*, 513 U.S. at 324 (emphasis added) There is no evidence as *unreliable* as recantation testimony, let alone short-lived repudiated recantation testimony. *See State v. Krum*, 903 P.2d 596, 602 (Ariz. 1995) ("There is no form of proof so unreliable as recanting testimony.") The federal circuits have uniformly acknowledged the inherent unreliability of recanted testimony. *United States v. Gresham*, 118 F.3d 258, 267 (5th Cir. 1997) ("recanting affidavits and witnesses are viewed with extreme suspicion by the Courts"); *Olson v. United States*, 989 F.2d 229, 231 (7th Cir. 1993) ("It is a truism that our courts treat recantations with skepticism"); *Kandiel v. United States*, 964 F.2d 794, 797 (8th Cir. 1992) (recanted testimony viewed with "considerable skepticism"); *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991) "Recanting affidavit and witnesses are viewed with extreme suspicion"); *Sanders v. Sullivan*, 863 F.2d 218, 225 (2nd Cir. 1988) (recantation of trial testimony is "looked upon with the utmost suspicion"); *United States v. Santiago*, 837 F.2d 1545, 1550 (11th Cir. 1988) ("recantations are viewed with extreme suspicion by the courts"); *United States v. Ahern*, 612 F.2d 507, 509 (10th Cir. 1980) ("Recantation of testimony given at trial is not looked upon with favor," but "with downright suspicion"); *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973) (recantation of trial testimony is "looked upon with the utmost suspicion").

Thus, the Ninth Circuit stands as a minority of one among the federal circuits in holding that recantation testimony is reliable enough to unlock the *Schlup* gateway. But it is even worse; here we have a *repudiated* recantation. A repudiated recantation is not even substantive evidence, and can be used *only* to cross-examine the witness.[5] *United States v. Glantz*, 884 F.2d 1483, 1486 (lst Cir. 1989); *Lindsey v. United States*, 368 F.2d

---

5. Because Dunbar is dead, it cannot even be used for this purpose.

633, 636 (9th Cir. 1966); *see also* Moore's Federal Practice § 633.05[2] (3d ed. 1997) As the dissent aptly noted:

> Recanting testimony is easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial. A *repudiated* recantation like Dunbar's is even less worthy, of serious consideration.

(Appendix B at 4, emphasis in original).

The majority clearly erred in not requiring Carriger to present "new reliable evidence" before it unlocked the *Schlup* gateway. If the decision is allowed to stand, the abuse of the writ doctrine will be effectively eviscerated —at least in the Ninth Circuit. "Reliability" must be the key that unlocks the *Schlup* gateway.

B. NEW RELIABLE EVIDENCE ESTABLISHES CARRIGER'S GUILT.

In addition to disregarding the reliability requirements in allowing Dunbar's repudiated recantation to unlock the *Schlup* gateway, the majority also summarily dismissed—and did not even discuss in its *Schlup* analysis—new reliable evidence that establishes Carriger's guilt. This clearly violated the mandate of *Schlup*.

In *Schlup* this Court stated that the *Carrier* standard it adopted "is intended to focus the inquiry on actual innocence." 513 U.S. at 327. And that "the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327–28. It explained that:

> The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

Id. at 328, quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970) Thus, this Court mandated that a habeas court considering a state prisoner's assertion that he met the "actual innocence" gateway standard *also* consider new evidence substantiating guilt.

During the second post-conviction relief proceedings in 1987, a criminalist disassembled the wad of tape that had been wrapped around the victim's hands into 12 segments, then reconstructed the tape. (Appendix H at 28–30) The criminalist then measured the entire length of tape, finding

it to be approximately 8 feet 9 inches in length. (*Id.* at 30) He then measured *from the end of the roll of tape* to where Carriger's print had been lifted, and found the distance to be approximately 21½ inches. (*Id.*).

The criminalist was requested to attempt to ascertain the precise location of Carriger's print on the wad of tape in response to Carriger's assertion that he intended to challenge identification of the latent print. (Appendix H at 2–3) The State *also* presented the testimony of two additional fingerprint experts to corroborate the fact that the print on the wad of tape was definitely left by Carriger. (*Id.* at 4–22) Faced with this extremely probative evidence, Carriger's counsel withdrew their challenge to the identification of the print, and objected to the State presenting the aforementioned evidence. (*Id.* at 3) In light of Carriger's abandonment of his challenge to the print identification, Judge Ryan concluded that the evidence was no longer relevant to the claims Carriger was then pursuing, but allowed the testimony to be presented as an offer of proof. (*Id.*) Carriger's attorneys had received the criminalist's report a week before he testified, interviewed him before he testified, and cross-examined him at the hearing. (*Id.* at 3, 31–35).

Carriger's "theory" on why his fingerprint was on the wad of tape wrapped around the victim's hands was that it was on the exterior of the roll of tape when Dunbar allegedly "took" the tape from his van:

> The victim in this case had his hands bound with tape. On the tape was a fingerprint belonging to Carriger. Carriger alleges as another aspect of incompetence that Gay did not effectively argue this fact away. Carriger now claims Dunbar took the tape from Carriger's van and the print was already on the tape when Dunbar took the tape. This can only be characterized as a weak assertion and, at best, is not very credible.

Carriger III, 692 P.2d at 1004. The fact that Carriger's print could *not* have been on the outside of the roll establishes his guilt beyond *any* doubt. In denying the motion for rehearing in the third postconviction relief proceeding, Judge Ryan stated:

> [I]t was established that the print was nearly two feet from the end of the tape. *The impact of this evidence at any subsequent trial would be enormous*.
>
> Petitioner throughout these proceedings argued that Dunbar "framed" Petitioner. To support this argument, Petitioner claimed that all the physical evidence was tampered with or planted by Dunbar. A key argument was that Petitioner's print was on the end of the tape and therefore was either there

> accidently or planted by Dunbar. The subsequent examination of William Morris establishes that the print is 21½ inches from the end of the tape. *This evidence literally destroys Petitioner's argument* that Dunbar somehow was able to manipulate all the physical evidence . . . Where the print was found would be crucial at any subsequent trial. And *its placement nearly two feet from the end of the tape is devastating to the petitioner.*

(Appendix G at 2, emphasis added) The district court also found this new evidence to be reliable and probative. (Appendix C at 9 and n.4).

The en banc majority did not even discuss this new reliable evidence in conducting its *Schlup* "analysis." (Appendix A at 34–37) In purporting to conduct a "[c]lose examination" of the physical evidence to shoot down Judge Ryan's credibility finding, it attempted to explain it away as follows:

> *The fingerprint on the tape*. Dunbar explained [in his repudiated recantation] that he had taken the adhesive tape, used to bind Shaw's hands, from Carriger's van. The tape belonged to Carriger, and this would explain Carriger's fingerprint on the tape. Had Carriger left the print while binding the victim, as the state contends, *it is difficult to understand how he could have left only one print*. The State points to an offer of proof made at the 1987 hearing, in which a criminalist testified that he had reconstructed the tape and determined that Carriger's fingerprint was located 21 inches from an end of the tape. This testimony suggests that the print was left during the binding of Shaw's hands.
>
> *Cross examination was able to bring out an internal inconsistency in the expert's testimony*: The expert stated he could piece together all of the segments of tape cut from the victim's wrists by matching the irregularity of the edges, but admitted *he could not match either end of the reconstructed tape to the end of the roll*. The state court did not admit the criminalist's testimony into evidence, and made no findings as to its relationship. The defense never had an opportunity to examine the tape, in either reconstructed or unreconstructed form, or to have its own expert test the state's criminalist's conclusions. Although we may consider the offer of proof in our inquiry, *we find no basis to conclude the criminalist's conclusions are reliable* and therefore determine they should be accorded little weight.

(Appendix A at 26–37, emphasis original in part, added in part; footnote omitted) Thus, the majority found the reconstruction of the tape unreliable for two reasons: (1) a perceived "inconsistency in the expert's testimony" (inability to match either end of the length of tape to the roll) and; (2) the fact that only one identifiable latent print was lifted from the wad of tape wrapped around the victim's hands. The first reason given by the majority is incorrect: the criminalist testified that the print was 21½ inches "from the end of the metal roll of tape." (Appendix H at 30) The second reason given the majority (only one identifiable print) is "silly." (Appendix B at 20).

The criminalist clearly testified that Carriger's print was 21½ inches from the end of the roll of tape:

> A. After I laid the segments of tape out, after separating them from the wad, I just started matching them together along irregular edges and fitting them in. On some of the junctions, I used either a magnifier or a microscope to have a closer look at the edges and a closer look at any of the contaminants that went across the tear and finally got the different segments laid out in the original order that they were before they were torn from each other.
>
> While I was doing this, I was able to fit the piece of tape containing the latent fingerprint in its appropriate place along the length of tape. After I did that and had it all laid out on the work bench, I measured the length that I had reassembled and then *I measured the distance from the roll of tape -- the ends of the roll, to the areas of the latent fingerprint match or the latent fingerprint segments*.
>
> . . .
>
> Q. Where is the segment in Exhibit 43, the latent lift segment of tape -- *where does that occur from the end of the metal roll of tape* contained in the plastic bag in Exhibit 41?.
>
> A. *Approximately 21 and a half inches*, ma'am.
>
> Q. To what degree of certainty are you certain of this result? Did I ask a bad question? Is there any degree of certainty that you can state that you are confident in your conclusion that you have reassembled the entire roll?.
>
> A. I am certain that I have reassembled the segment of tape that was torn to make the wad, and *I am certain that the latent fingerprint lift segment is in its appropriate place in relation to the length of tape and to the piece of tape on the ends of the roll of tape*.

(Appendix H, at 30 emphasis added) The majority was apparently confused by Carriger's cross-examination of the criminalist regarding where on the wad of tape the two segments that included the latent print had been located. (*Id.* at 33–34) The majority was clearly wrong in stating that the criminalist "could not match either end of the reconstructed tape to the end of the roll." (Appendix A at 26)[6].

The other reason given by the majority for finding the reconstruction unreliable—that only one of Carriger's prints was left on the wad of tape—is simply incredulous:

> The majority also relies on the fact that only one fingerprint was found on the tape: "Had Carriger left the print while binding the victim, as the sate contends, it is difficult to understand how he could have left only one print." Maj. op. at 14638. *This is silly*. We are not talking here about nine feet of tape laid out flat like an FBI fingerprint card. Most of the tape was stuck to itself and rolled up in a big wad, hardly the ideal medium for latent prints: "The development of fingerprints on adhesive tape has always been a challenge for latent fingerprint examiners." Advances in Fingerprint Technology 88 (Henry C. Lee & R.E. Gaensslen eds., 1994). *How many recoverable prints do my collegues expect to find on such an inhospitable surface*? I find it surprising that even a single readable print was retrieved from a wad of adhesive tape cut from the body of a murder victim.

(Appendix B at 20–21, emphasis added).

Thus, the majority was flat wrong in concluding that the reconstruction of the tape was not reliable, and in failing to consider this probative reliable evidence in conducting its *Schlup* "actual innocence" analysis. The evidence *had* to be considered. *Schlup*, 513 U.S. at 327–28. And, it establishes Carriger's guilt beyond *any* doubt.

---

6. Moreover, *even if* the criminalist had been unable to determine which end of the tape matched up to the roll, Carriger's guilt is clearly established:

> If Carriger's print got on the tape before the murder, *it could only have been on the outside of the reel, which would place it on the first few inches used to tie Shaw's wrist.*
>
> . . .
>
> The majority points to a perceived inconsistency in the expert's testimony because the criminalist was unable to tell which end of the tape matched the end of the roll. It is difficult to understand why the majority sees this as inconsistent--*either way the fingerprint is not near the end.*

(Appendix B at 17, 18, emphasis added)

C. THE MAJORITY LOWERED THE SCHLUP "ACTUAL INNOCENCE" STANDARD.

In addition to utilizing unreliable repudiated recantation testimony to unlock the *Schlup* gateway and refusing to consider new reliable evidence which establishes Carriger's guilt, the majority "cuts the heart out of *Schlup*" (Appendix B at 8) by lowering the *Schlup* "actual innocence" standard to a "confidence in the outcome of the trial" standard. If allowed to stand, the majority holding will transform the "extraordinary" and extremely rare case envisioned by *Schlup* into the type of case often presented to federal courts on the eve of execution.

In *Schlup*, this Court made it clear that its adoption of the *Carrier* "actual innocence" standard required a habeas petitioner seeking federal review of otherwise abusive or procedurally barred claims "to show that he is 'actually innocent.'" 513 U.S. at 327 Indeed, it said so *several* times. *See Id.* at 324, 326, 327, 329. The Court explained how a district court was to determine whether a habeas petitioner had proven his "actual innocence":

> The meaning of actual innocence as formulated by *Sawyer* and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that *no reasonable juror would have found the defendant guilty*. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the *standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do*. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

513 U.S. at 329 (emphasis added).

Rather than acknowledge and apply the *Carrier* standard adopted by this Court in *Schlup*, the majority seizes upon part III of this Court's opinion in which the Court distinguished between an hypotesized *Herrera* "freestanding" "actual innocence" claim, and the type of "gateway" "actual innocence" claim raised in *Schlup*. (Appendix A at 34–36). *See Schlup*, 513 U.S. at 313–17. It is from this discussion that the majority pulls (then applies) the phrase "a court cannot have confidence in the outcome of the trial *unless* the Court is also satisfied that the trial was free of nonharmless error." (*Id.* at 35, quoting *Schlup*, 513 U.S. at 316, emphasis added by majority) The majority failed to acknowledge that the

Court went on to adopt the *Carrier* "actual innocence" standard which, while lower than the hypothesized *Herrera* standard, still *requires* the petitioner to prove "actual innocence," *not* merely demonstrate a lack of confidence in the verdict. *See Schlup*, 513 U.S. at 324-30. And, in criticizing the dissent for "incorrectly assum[ing]" that Carriger "must prove that he is actually innocent" the majority again quotes from that portion of this Court's opinion in *Schlup* distinguishing between a *Herrera*-type actual innocence claim and a *Schlup* gateway claim. (Appendix A at 36)

It is crystal clear that the majority significantly lowered the *Schlup* "actual innocence" standard to a "confidence in the outcome" standard:

> We do not agree . . . that our test under *Schlup* is to decide how a hypothetical jury would regard each bit of new evidence. *Our task is to determine whether confidence in the actual verdict is undermined. Schlup*, 115 S. Ct. at 861.

(Appendix A at 27 n. 4, emphasis added) Further, in finding that Carriger failed to meet the *Herrera* standard,[7] the majority effectively conceded that he could *not* meet the *Carrier/Schlup* standard:

> Although the postconviction evidence he presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, *not affirmatively to prove Carriger's innocence*. Carriger has presented no evidence, for example, demonstrating he was elsewhere at the time of the murder, nor is there any new and reliable physical evidence, such as DNA, that would preclude any possibility of Carriger's guilt. Although Dunbar's confession

---

7. The majority also erred in setting forth the *Herrera* "actual innocence" standard. It adopted and applied the "probably innocent" standard suggested by Justice Blackmun in his *dissent* in *Herrera*. (Appendix at 32) *See Herrera*, 506 U.S. at 442–44 (Blackman, J., dissenting) In *Herrera*, this Court assumed, for the sake of deciding the case before it, "that a *truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief*" if there were no state avenue open to process such a claim. 506 U.S. at 417 (emphasis added) It then said that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.* In *Schlup* this Court stated that an *Herrera* claimant would have to "unquestionably" establish his innocence. 513 U.S. at 317. It is clear that, if a *Herrera* claim exists, it must be proven by far more than a mere preponderance—*at least* by "clear and convincing" evidence. *See Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997) (*Herrera* burden is "at least as exacting as the clear and convincing evidence standard")

What the majority has effectively done is lower the *Herrera* standard to the *Schlup* standard and, in turn, lower the *Schlup* standard to the *Strickland* standard.

> exonerating Carriger does constitute some evidence tending affirmatively to show Carriger's innocence, we cannot completely ignore the contradictions in Dunbar's stories and his history of lying. Accordingly, the confession by itself *falls short of affirmatively showing that Carriger more likely than not is innocent*.

(*Id.* at 33–34, emphasis added) And, in finding that Carriger had met the *Schlup* standard, it stated:

> Although *Carriger has not affirmatively proved his actual innocence* sufficiently to satisfy *Herrera*, we believe he has more than shown *sufficient doubt about the validity of his conviction* to satisfy *Schlup* and permit consideration of his constitutional claims.

(*Id.* at 36, emphasis added).

As noted by the dissent, "The majority seems to adopt the *Strickland* prejudice standard rather than the *Schlup/Carrier* for Ninth Circuit actual innocence claims." (Appendix B at 9, n. 7) This Court must see to it that the Ninth Circuit applies "what *Schlup* demands." (*Id.* at 9).

D. CARRIGER'S "ACTUAL INNOCENCE" CLAIM IS NOT LINKED TO A CONSTITUTIONAL ERROR.

Finally, aside from the aforementioned errors, the majority went on to review a constitutional claim unattached to the claim of actual innocence.[8] This appears to be contrary to the dictates of *Schlup* and *Carrier*.

In *Schlup* this Court adopted the *Carrier* actual standard, stating that "[t]he *Carrier* standard requires to show that '*a constitutional violation* has probably resulted in the conviction of one who is actually innocent.'" 513 U.S. at 327 (emphasis added), quoting *Carrier*, 477 U.S. at 496. It also said:

> We conclude that *Carrier*, rather than *Sawyer*, properly strikes that balance when the claimed injustice is that *constitutional error has resulted in the conviction of one who is actually innocent* of the crime.
>
> . . . [E]xperience has taught us that a substantial claim that *constitutional error has caused* the conviction of an innocent person is exceedingly rare.

---

8. As previously noted, the *Brady* claim related to the State's failure to obtain, review, and hand over to the defense Dunbar's DOC file.

Id. at 324 (emphasis added) And, the Court cited to and quoted from *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) in discussing the "fundamental miscarriage of justice" gateway to otherwise barred federal claims. *Id.* 314-14. In *McCleskey* (as in *Carrier*) this Court required that the "actual innocence" claim be linked to the alleged constitutional error. 499 U.S. at 502 ("McCleskey cannot demonstrate that the alleged *Massiah* violation *caused the conviction* of an innocent person" (emphasis added)) In adopting the *Carrier* standard, the Court did not state that it was deleting the requirement that the showing of actual innocence be linked to the underlying constitutional claims.[9] *See O'Dell v. Netherland*, 95 F.3d 1214, 1246 n. 26 (4th Cir. 1996) (noting that in *Schlup* this Court did not appear to abandon the "but for" requirements of *Carrier* and *McCleskey*)

In the present case, Dunbar's recantation is not at all tied to the *Brady* claim addressed by the majority, or *any* other federal constitutional claim. Rather, it is a "freestanding" claim. Thus, putting aside all of its other misapplications of *Schlup*, the majority erred in unlocking and passing through the *Schlup* gateway and reviewing a constitutional claim unattached to the "actual innocence"claim.[10]

III

THE EN BANC COURT'S HOLDING THAT A PROSECUTOR MUST OBTAIN, REVIEW, AND PROVIDE TO THE DEFENSE, INFORMATION OF WHICH THE DEFENSE HAS ACTUAL KNOWLEDGE IS INCONSISTENT WITH *BRADY* AND ITS PROGENY AND CONFLICTS WITH THE LAW OF THE OTHER FEDERAL CIRCUIT COURTS.

After passing through the *Schlup* gateway, the en banc majority held that the State of Arizona committed a *Brady* violation by failing to obtain, review, and hand over to the defense Robert Dunbar's DOC file. The majority acknowledged that the prosecution may not have been aware of the file (Appendix A at 39) and that Carriger and his trial counsel *knew* of the existence of Dunbar's DOC file. (*Id.* at 10) The majority's holding is

---

9. In *Schlup*, the petitioner's constitutional claims were linked to his claim of actual innocence; he claimed that his trial counsel was ineffective in "failing to interview and to call witnesses who could establish Schlup's innocence," and that the State committed a *Brady* violation by not disclosing the witnesses. 513 U.S. at 306, 307, 314.

10. In the event the Court intended to abandon the "but for" requirement in *Schlup* it should expressly say so to provide guidance to federal courts reviewing *Schlup* claims. *See O'Dell*, 95 F.3 d at 1246 n.26

inconsistent with this Court's holding in *Brady* and its progeny, and conflicts with the law of the other federal circuits.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *Giglio v. United States*, 405 U.S. 150, 153–55 (1972), the Court held that *Brady* applied to impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) In *Bagley*, the Court reaffirmed that impeachment evidence as well as exculpatory evidence fell within *Brady* material, 473 U.S. at 676–77, and announced that the *Strickland* prejudice analysis applied, regardless of whether the defendant requested disclosure. 473 U.S. at 682. Finally, in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 1567 (1995), the Court placed upon the prosecution the following burden regarding "undisclosed" evidence: "the individual prosecutor has a duty to learn of any favorable evidence known to the others *acting on the government's behalf in the case, including the police*." (emphasis added)

This Court has *never* held that the prosecution has an obligation to seek out from government agencies, not involved in the investigation or prosecution, possible impeachment evidence *known to the defense* (but *not* the prosecution), place it on a silver platter, and present it to the defense. *See United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) ("neither *Kyles* nor [*United States ex rel. Smith v.*] *Fairmain* [769 F.2d 386 (7th Cir. (1995)] can be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue") That is precisely what the Ninth Circuit has held is required by *Brady* and *Kyles*. (Appendix A at 38–40)

This case was prosecuted by the Pima County Attorney's Office (based upon a conflict in the Maricopa County Attorney's Office) and investigated by the City of Phoenix Police Department. The majority acknowledged that the record did not indicate that the prosecutors involved in the case "ever actually possessed Dunbar's corrections file." (Appendix A at 39) Nor did the Phoenix police. The Arizona Department of Corrections—a *state* agency—is independent of both the County Attorney's Office and the Phoenix Police Department, and was *not* at all involved in the investigation or prosecution of this case. However, as acknowledged by the majority, both Carriger and his counsel *knew* of the existence of Dunbar's DOC file:

> Carriger's principal postconviction claim was that his trial counsel had been ineffective for failing to investigate Dunbar adequately and for *failing to obtain Dunbar's Department of Corrections file, despite a request from Carriger that he do so.*

(*Id.* at 10, emphasis added) And, based upon the following excerpts of Carriger's letter to trial counsel, it is clear that that defense knew of the type of material that could be found in Dunbar's DOC file, as well as the fact that Dunbar had been an informant:

> Point #3
> Bobby Dunbar was the informant for the state against John Douglas Troutman for a safe burglary of the National Cash Register Company (about 1968 I think)
>
> . . .
>
> Point #4
> Perhaps *while we are getting Dunbar's prison record* we should also get a copy of mine.

(Appendix B at 22, emphasis added by Judge Kozinski) As pointed out by the dissent: "A prosecutor has no duty to investigate and turn over impeachment evidence the defense already knows about." (*Id.* at 23)

The other federal circuits uniformly agree: *Brady* is not violated if the defense has knowledge of the existence of potentially exculpatory evidence or impeachment material and simply fails to obtain it. *Rector v. Johnson*, 120 F.3d 551, 558–59 (5th Cir. 1997); *United States v. Flores-Mireles*, 112 F.3d 337, 340 (8th Cir. 1997); *United States v. Zagari*, 111 F.3d 307, 320 (2nd Cir. 1997); *Morris*, 80 F.3d at 1170 (7th Cir.); *Routly v. Singletary*, 33 F.3d 1279, 1285 (11th Cir. 1994); *United States v. Clark* 928 F.2d 733, 738 (6th Cir. 1991); *United States v. Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980); *Hampton v. United States*, 504 F.2d 600, 603 (10th Cir. 1974) Indeed, most circuits hold that *Brady* is not violated if the defense could have obtained the information from sources external to the prosecution through the exercise of reasonable "diligence." *Rector*, 120 F.3d at 558–59 (5th Cir.); *Flores-Mireles*, 112 F.3d at 340 (8th Cir.); *Zagari*, 111 F.3d at 320 (2nd Cir.); *Morris*, 80 F. 3d at 1170 (7th Cir.); *Routly*, 33 F.3d at 1285 (11th Cir.); *Clark*, 928 F.3d at 738 (6th Cir.).

The "silver platter doctrine" fashioned by the en banc majority is out of line with this Court's *Brady* caselaw and conflicts with every other federal circuit to address the issue. And, it places an untenable burden on the prosecution to locate and scour through the records of every conceivable government agency unconnected to the investigation or

prosecution of the case in search of potential impeachment evidence, then present it to the defense—even if the defense is aware of the existence of the material but simply fails to, or chooses not to, obtain the material. For now, however, that is the law of the Ninth Circuit. This Court must grant certiorari to correct this perversion of *Brady*.

CONCLUSION

The en banc majority has clearly erred in refusing to grant deference to a state court's credibility determination, in its interpretation and application of this Court's decision in *Schlup*, and in finding a *Brady* violation where the defense had actual knowledge of the documents containing the impeachment material. The decision is contrary to this Court's caselaw and conflicts with virtually every other federal circuit court of appeals on all three issues. If allowed to stand, the decision will create chaos throughout federal courts within the Ninth Circuit, and will likely adversely influence federal courts nationwide.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

JOSEPH T. MAZIARZ
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONER

HC6-070
15663

ORIGINAL

Supreme Court, U.S.
FILED
APR 13 1998
CLERK

No. 97-1509

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

TERRY L. STEWART, Director,
Arizona Department of Corrections, et al.

Petitioners,

vs.

PARIS HOYT CARRIGER,

Respondent.

RECEIVED
APR 15 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent Paris Carriger moves this Court for leave to file the attached Brief of Respondent In Opposition To Petition For Writ Of Certiorari without payment of costs and to proceed *in forma pauperis*.

Respondent has previously been granted leave to proceed *in forma pauperis* by the United States District Court for the District of Arizona, and counsel was appointed to represent him in those proceedings, and proceedings in the Court of Appeals

39 pp

under 21 U.S.C. § 848(q).

Respectfully submitted this 13th day of April, 1998.

FREDRIC F. KAY
Federal Public Defender
Denise I. Young
97 E. Congress, Suite 130
Tucson, AZ 85701

Attorneys for Respondent

No. 97-1509

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

TERRY L. STEWART, Director,
Arizona Department of Corrections, et al.

Petitioners,

vs.

PARIS HOYT CARRIGER,

Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FREDRIC F. KAY
Federal Public Defender
Denise I. Young
Assistant Federal Public Defender
97 E. Congress
Suite 130
Tucson, AZ 85701-1716
(520) 620-7048

Attorneys for Respondent

CAPITAL CASE

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that the evidence showing that Respondent is innocent of the crime for which he was convicted and sentenced to death is insufficient to preclude his execution under the Eighth Amendment, but sufficient to permit consideration of his otherwise-barred constitutional claims under Schlup v. Delo, 513 U.S. 298(1995)?

2. Whether, in a criminal case, the State has a duty to disclose to the defense record evidence in its possession impeaching the credibility of its principal trial witness?

TABLE OF CONTENTS

RESTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTER STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 10

I. THE COURT OF APPEALS PROPERLY APPLIED THE RULE OF SCHLUP V. DELO TO THE FACTS OF THIS CASE 10

II. THE COURT OF APPEALS PROPERLY APPLIES THE RULE OF BRADY V. MARYLAND TO THE FACTS OF THIS CASE 22

III. IF REVIEW IS GRANTED, THE COURT SHOULD ALSO CONSIDER WHETHER THE COURT OF APPEALS PROPERLY APPLIED THE EIGHT AMENDMENT RULE RECOGNIZED IN HERRERA V. COLLINS 29

CONCLUSION 32

TABLE OF AUTHORITIES
FEDERAL CASES

Addington v. Texas, 441 U.S. 418 (1979) 31

Amrine v. Bowersox, 128 F.3d 1222 (8th Cir. 1997) 18

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) ... 20

Brady v. Maryland, 373 U.S. 83 (1963) 24

Carriger v. Stewart, 95 F.3d 755 (9th Cir.1996) 9, 10, 13, 20

Gardner v. Florida, 430 U.S. 349 (1977) 20

Giglio v. United States, 405 U.S. 150 (1972) 24

Hampton v. United States, 504 F.2d 600 (10th Cir. 1974) 26

Herrera v. Collins, 506 U.S. 390 (1993) 9, 30, 31

Jackson v. Virginia, 443 U.S. 307 (1979) 31

Kyles v. Whitley, 514 U.S. 419 (1995) 24

Kyles v. Whitley, 514 U.S. at 437 25

Levine v. Torvik, 986 F.2d 1506 (6th Cir. 1993) 17

Marshall v. Lonberger, 459 U.S. 422 (1983) 12

Martinez v. Wainwright, 621 F.2d 184 (5th Cir.1980) 25

O'Dell v. Netherland, 95 F.3d 1214, aff'd on other grounds, 117 S. Ct. 1969 (1997) 22

In re Oliver, 333 U.S. 257 (1948) 20

Rector v. Johnson, 120 F.3d 551 (5th Cir. 1997) 26

Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980) 26

Routly v. Singletary, 33 F.3d 1279 (llth Cir. 1994) 26

In re Ruffalo, 390 U.S. 544 (1968) 20

Schlup v. Delo, 513 U.S. 298 (1995) ..... passim

United Sates v. Iverson, 648 F.2d 737 (D.C. Cir. 1981) 26

United States v. Burnside, 824 F. Supp. 1215 (N.D. Ill. 1993) 25

United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973), overruled on other grounds, United States v. Henry, 749 F.2d 203 (5th Cir. 1984) 25

United States v. Flores-Mireles, 112 F.3d 337 (8th Cir. 1997) 26

United States v. Johnston, 368 U.S. 220 (1925) 10, 12

United States v. Meinster, 619 F.2d 1041 (4th Cir. 1980) 26

United States v. Prior, 546 F.2d 1254 (5th Cir. 1977) 26

United States v. Strifler, 851 F.2d 11977 (9th Cir. 1988) 25

Wallace v. Hocker, 441 F.2d 219 (9th Cir. 1971) 26

STATE CASES

Ortega v. Holmes, 118 Ariz. 433, 577 P.2d 741 (Ct.App. 1978) 26

State v. Carriger, 692 P.2d 991 (1982) 14, 26

FEDERAL STATUTES

28 U.S.C. § 2254(d) 12

STATE STATUTES

Ariz. Rev. Stat. Ann. § 31-221 26

I. COUNTER STATEMENT OF THE CASE

Petitioners' Statement of the Case sets forth a version of the facts which accepts every detail of the trial testimony of the prosecution's key trial witness, Robert Dunbar. Pet. at 1-2. This is both procedurally inappropriate (because Respondent's Habeas Corpus Petition, which alleged a quite different set of facts, was summarily dismissed by the District Court below) and disingenuous: for the one thing in this case on which there is no longer any serious dispute is that Mr. Dunbar cannot be believed. Robert Dunbar, the prosecution's key witness, turns out to have been a big liar. Had the jurors seen Dunbar as we now see him, they would not have believed a thing he said. Pet. App. at B-2 (dissenting opinion); accord id. at A-8 (majority opinion) ("Dunbar was a known habitual liar accustomed to blaming others for his own crimes."); Pet. App. at D-5 (state postconviction judge) ("... Dunbar is a liar ....").

The decision below was framed by a careful recitation of the facts and state court proceedings which did not rely on any of Dunbar's various versions of the truth. There was no dispute between the majority and dissenting judges below about these basic facts, which we repeat here for the Court's convenience:

A. The Robbery and Murder

> In December 1977, Paris Carriger was released from prison, and soon contacted Robert Dunbar, a prison acquaintance. Carriger acquired a van and some tools, and began doing construction work. When he needed a place to stay, Dunbar agreed that Carriger could park his van on Dunbar's property and live in it. On March 12, 1978, Carriger parked his van next to the house Dunbar shared with his wife, Joyce Stevens, and her children.
>
> The next morning, March 13, Carriger called in sick at work. He then spent the day with Dunbar. The two visited a number of gun shops, and Dunbar eventually purchased a .22 caliber Luger pistol. Because it was illegal for

Dunbar, a convicted felon, to purchase a gun, Dunbar lied on the federal gun purchase form, falsely claiming to have no felony convictions. Later in the day, the two visited Shaw's jewelry store, where Dunbar had his watch repaired. After leaving the store, one remarked to the other that the store would be an easy place to "hit." Dunbar testified at trial that Carriger made this remark, though Dunbar later testified in postconviction proceedings that he said it himself.

The men returned to Dunbar's house from Shaw's store between 3:00 and 3:30 p.m., and then went their separate ways. They met again at Dunbar's house between 5:30 and 6:30 that evening. In the interim, the robbery and murder were committed at Shaw's jewelry store.

In their later testimony, Dunbar and Carriger each accused the other of committing the crime. Carriger testified at his 1982 postconviction hearing that upon returning to Dunbar's house shortly after 3:00, Dunbar got into an argument with his wife, at which point Carriger left in his van and went to a nearby restaurant. Carriger testified he then went shopping for jeans, browsed briefly in an adult bookstore, and returned to Dunbar's house. Parking his van, he walked to a nearby convenience store and back, finally returning at about 6:00. Carriger testified that shortly after his return, as he sat in his van listening to the radio, Dunbar showed up. According to Carriger, Dunbar had a guilty look, and was holding a pair of Carriger's boots. Dunbar allegedly told Carriger that Carriger should replace the boots because they were "hot," suggesting Dunbar had worn them during the commission of a crime. Carriger testified that Dunbar then showed Carriger a bag containing a half dozen watches, and offered the watches to satisfy a debt Dunbar owed Carriger. Carriger refused the offer.

Dunbar, on the other hand, testified at trial that upon returning home sometime after 3:15, he retired for a nap with his wife. He said he was awakened sometime between 5:30 and 6:30 by Carriger, who summoned Dunbar outside. According to Dunbar, Carriger said he had robbed Shaw's jewelry store, and asked for Dunbar's help in getting rid of "this stuff." Dunbar said Carriger took Dunbar outside to his van, where he showed Dunbar an attache case containing jewelry and watches, and asked for Dunbar's help in removing the tags. Dunbar testified that together they removed the tags from the jewelry, and placed the tags in a paper bag. Dunbar also testified that Carriger described how he had tied up Shaw and killed him by beating him with a skillet and then choking him with his own necktie.

Dunbar's and Carriger's stories agree that after they rejoined at Dunbar's house, both knew that at least a robbery had been committed. Shortly afterward, Dunbar and Carriger went out together. Their first stop was the home of Jackie White, Dunbar's stepdaughter, who had recently moved out of Dunbar's house and

who had a friendly relationship with Carriger. Carriger gave White two small cases, asking her to hold onto them. One of the cases turned out to be the case for the gun Dunbar had purchased that morning and contained only a gun cleaning kit, holster, and manual. The other case, an attache case, contained most of the stolen jewelry, the gun itself, and ammunition. The gun case and the cleaning kit inside it bore Carriger's fingerprints. The jewelry inside the attache case, however, bore only Dunbar's fingerprints, not Carriger's. The gun yielded no fingerprints.

Carriger and Dunbar then went to a massage parlor. While there, Dunbar produced a loose diamond taken from Shaw's and tried to sell it to a massage parlor employee. Dunbar and Carriger continued on to a shopping mall, where Dunbar again tried several times to sell pieces of the stolen jewelry that he had with him. While Dunbar showed the jewelry to a number of mall jewelers, Carriger bought new boots. The two then returned to Dunbar's house.

B. Dunbar's Role in the Investigation

The following morning, Dunbar contacted detectives of the Phoenix Police Department and told them he had information regarding the murder and robbery. He also told them he had committed a recent (unrelated) burglary, and wanted immunity in exchange for his information and testimony. Detectives met Dunbar at a mall coffee shop, where Dunbar gave them pieces of jewelry taken during the robbery. He told the detectives that Carriger had committed the robbery and murder, and had asked for Dunbar's help in selling the stolen jewelry and getting rid of the evidence.

Dunbar told the detectives that Carriger might be armed with the handgun Dunbar had purchased the previous day, and that Dunbar considered Carriger to be extremely dangerous. Dunbar said that Carriger would kill police officers if he saw them approaching the residence. At the detectives' request, Dunbar called Carriger with a lie designed to get Carriger out of the house. Once Carriger left Dunbar's house, police pulled his van over and arrested him. Carriger was unarmed and did not resist arrest.

Dunbar also told the detectives he and Carriger had gone driving north of Phoenix the previous evening to dispose of the evidence. According to Dunbar, Carriger threw evidence out the window as Dunbar drove. After arranging the ruse leading to Carriger's arrest, Dunbar retraced his drive of the previous evening accompanied by a homicide detective, and led the detective to evidence discarded along the roadside, including a jacket, gloves, and boots allegedly worn by Carriger during the robbery, business cards from Shaw Jewelers, Robert Shaw's wallet and driver's license, and the cut-up pieces of Shaw's credit cards. Dunbar

also directed police to the home of Ms. White, where they recovered the two cases Carriger had left the previous evening. Finally, Dunbar led police to a pair of jeans in the canal behind Dunbar's house, where he said Carriger had discarded them. The canal was nearly dry and the jeans were partially submerged in a shallow puddle. The jeans had a piece of one inside pocket cut out in a place where Carriger customarily marked his jeans with his name or initials.

One of the detectives who met Dunbar at the mall testified at trial that the detectives took the story Dunbar told them at face value. The same detective stated in a 1994 affidavit that one reason he took Dunbar's word was that he knew at the time that Dunbar was a longtime informant for the Phoenix Police burglary unit. That status was not made known to the defense or brought out at trial. Dunbar's history as an informant, as will be discussed, turned out to be somewhat less than reliable, and the detective who knew of Dunbar's informant status and took his story at face value in 1978 stated in his 1994 affidavit that he now believes Dunbar participated in Shaw's murder. Dunbar was never taken into custody, and neither his person nor his house was ever searched.

C. The Evidence and Arguments at Trial

At trial, Dunbar, granted the immunity he requested, was the state's chief witness. He testified that he had been home asleep at the time of the robbery, and that Carriger had awakened him and confessed the crime. Dunbar's wife corroborated Dunbar's testimony that the two had been asleep together between 4:00 and 6:00 that afternoon.

In closing argument, the prosecutor vouched for Dunbar's credibility, stating repeatedly that Dunbar was not a liar. The prosecutor assured the jury that "[i]f there was any indication of his [Dunbar's] guilt or complicity in this, he would be on trial with him [Carriger]."

In addition to Dunbar's testimony and the physical evidence Dunbar had provided to the police, the state presented two additional pieces of physical evidence against Carriger. The first was a key to the attache case containing the stolen jewelry, which the arresting officer testified was found in Carriger's wallet when he was arrested. The second was a single fingerprint of Carriger's, which was found on the adhesive tape used to bind the wrists of the victim. The tape was the same type as Carriger kept in a first-aid kit in his van.

Because Carriger did not testify at trial, he offered no direct explanation of the key. Defense counsel did introduce evidence showing it was possible to plant a key in Carriger's prison property locker, and suggesting that the only keys in Carriger's possession when he was arrested were keys to his van and Dunbar's

house. The defense explanation of the fingerprint was that the tape was Carriger's, and his fingerprint was already on the end of the roll when Dunbar took the tape from Carriger's van and used it to commit the crime.

D. Post-trial Discovery of Dunbar's Corrections File

As a result of court-ordered discovery in the 1982 state postconviction proceedings, Carriger's counsel for the first time obtained Dunbar's corrections file. The file revealed that Dunbar was well known by state authorities to be a liar. Using Dunbar's file, Carriger's 1982 postconviction counsel located prison superintendents, guards and fellow prisoners who testified that Dunbar was a pathological liar, with a reputation for manipulation and deceit well beyond even that expected in the generally dishonest prison environment.

Dunbar's file showed him to be a prolific career burglar, whose career included committing ninety-two burglaries in one six-month period. Most important, the file revealed a pattern of lying to police and shifting blame to others. After one commercial burglary, Dunbar falsely accused police officers of keeping money they recovered from him after his arrest. After another, Dunbar falsely accused the police of lifting his fingerprints from a water glass and then lying about it. Following a third commercial burglary, Dunbar claimed to have found the money lying in the street, and further claimed to have sought and received legal advice before deciding to keep it. Dunbar's pattern when caught lying was to seek a deal with the police as soon as possible. Following a 1976 burglary, Dunbar displayed behavior strikingly similar to his behavior following the 1978 Shaw robbery/murder: immediately after committing the burglary, Dunbar, on his own initiative, approached a police officer with a story to shift the blame for his burglary. Dunbar claimed that he had been robbed, and tried to paint the supposed robber as the one who committed the burglary.

Dunbar's corrections file revealed other facts inconsistent with Dunbar's trial testimony. Although Dunbar had testified that he was "not a robber" and had never used force, violence, or a gun in a burglary, his file contained admissions that he had committed armed robberies of savings and loans, that he had aided and abetted armed robberies of convenience stores, and that he had used a gun in at least one burglary. The file also contained a claim by Dunbar that he had been involved in a shootout with Phoenix police.

Finally, Dunbar's file revealed a long history of violence. Dunbar had been committed to the Arizona State Hospital because of violent rages and threats against his family, including an incident in which he wielded a knife against his parents, threatening to kill them. Dunbar was also dishonorably discharged from the Army for uncontrolled aggressive behavior and physical assaults. A

presentence report in the corrections file noted that Dunbar had been found manipulative toward other people, and that he reacted violently when he didn't get what he wanted. Another report stated that Dunbar had been diagnosed as having a sociopathic personality.

E. Dunbar's Confessions

In 1987, at an evidentiary hearing on Carriger's postconviction petition, Dunbar confessed under oath in open court that he had robbed Shaw's jewelry store and murdered Robert Shaw. He testified that he had committed the crime along with his wife, Joyce Stevens, and that he had framed Carriger to avoid prosecution. At the hearing, Dunbar described the crime in detail, including the layout of the store and the back room where Shaw's body was found. Dunbar accurately described the method of Shaw's death, and the position in which his body was left. He stated that his wife had first struck Shaw with the skillet, but that he then finished Shaw off with the skillet and the necktie. Dunbar stated that he and his wife had worn gloves during the crime, and that he had bound Shaw's wrists using adhesive tape from the first-aid kit in Carriger's van.

Dunbar testified that in the past he had often shifted the blame to others for his own crimes. He said that consistent with his past practice, his thoughts after committing the crime immediately turned to finding someone on whom to pin the blame. That someone, he testified, happened to be Carriger.

Dunbar also confessed the crime in a four-page letter to a woman with whom he corresponded through a prison ministry program. Dunbar's letter described the crime in sufficiently vivid detail that it frightened the ministry correspondent, who stopped her correspondence with Dunbar. The correspondent has declared in an affidavit that she reported the letter to the Arizona Attorney General's office, and was asked to forward the letter to them by mail, which she did. The Attorney General's office never stated whether it received the letter or knows of its whereabouts; the letter itself has never been produced.

Joyce Stevens testified at the 1987 postconviction hearing that Dunbar had confessed the crime to her. Several witnesses testified that after a 1981 television special on capital prisoners had included a profile of Carriger, Dunbar boasted that he had set Carriger up. Larry White, Joyce Stevens' oldest son, also testified that Dunbar once later described to him what it was like to see someone's head crushed with a skillet.

Shortly before his death in 1991, Dunbar again confessed, this time to his cellmate. He told the cellmate that he had killed Robert Shaw so that Shaw could not identify him, and that he had blamed Carriger to avoid taking the "fall."

F. Other Postconviction Evidence Implicating Dunbar

Joyce Stevens testified in 1987 that she had lied at trial when she corroborated Dunbar's alibi that he was napping with her at the time of the robbery. Stevens testified that Dunbar had a common practice of telling the children he was going to take a nap, and then slipping out of the house through a bedroom door leading outside, and committing burglaries while he was supposedly asleep. She stated that Dunbar did just that on the afternoon of March 13, 1978, leaving the house from the bedroom shortly after calling her into the bedroom to join him for a "nap." According to Stevens, Dunbar later told her he had committed the crime. Stevens explained that she had lied at trial out of fear of Dunbar, who had threatened her life and those of her children if she told the truth.[1]

Several of Stevens' children testified that Dunbar was an abusive and controlling figure, who regularly beat them and instructed them to lie to the prosecution concerning his involvement in this case. Stevens also testified that the day after the robbery, while she was doing the family laundry, she found the clothes Dunbar had worn the previous day, and that there was blood on the pants that she could not get out. She testified that when Dunbar saw the blood-stained pants drying on the porch, he became angry that Stevens had found them, and told her to leave his things alone. He took the pants, and she never saw them again.

Richard Fein, a close friend of Dunbar's, testified in July 1987 that Dunbar had told him several different times that his favored method of getting rid of evidence was to cut it up into pieces and then drive around the desert, disposing of it a little at a time, so it couldn't be connected up. Fein also testified that Dunbar described his technique for maintaining a consistent lie when he was shifting blame for his crimes to others.

Finally, both Stevens and her mother testified that Dunbar had often stated that he would never leave a witness to a crime he had committed.

G. Dunbar's Recantation of His Confession

Dunbar recanted his October 1987 sworn confession in a letter to the judge three weeks later. Recalled to the stand, Dunbar claimed he had falsely confessed

---

[1]The dissent seizes upon an inconsistency between Dunbar's confession, which stated that he and Joyce committed the murder, and Joyce's recantation, which stated that Dunbar left the house alone. The dissent concludes that Joyce's recantation does not exonerate Carriger but supports the inference that Dunbar and Carriger acted together. There is no basis for this conclusion; the inference that Dunbar acted alone is at least equally plausible. There is no evidence that Dunbar and Carriger acted together to commit the murder.

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

8-11

212254(d)(8)(1994); Marshall v. Lonberger, 459 U.S. 422-432-35, 103 S.Ct. 843, 849-51 (1983).

Pet. App. at A-25 (footnote omitted).

The Court of Appeals meticulously read and analyzed the record to determine whether the bases for the state court finding--that Dunbar's confession was inconsistent with the physical evidence and that Dunbar had a motive to lie--were fairly supported. Id. at A-26-30. Only then did it conclude that they were not. Id. at 30.

C. The Court of Appeals Applied These Rules Properly.

Although this Court does not usually review facts, United States v. Johnston, 368 U.S. at 227, if it did in this case, it would affirm the Court of Appeals decision. The Court below properly applied the facts to the law, and concluded that in light of all the evidence, no reasonable juror would convict Respondent beyond a reasonable doubt on the testimony of Dunbar, an admitted perjurer. Pet. App. at A-36.

1. The Presumption Of Correctness Was Overcome.

The state court postconviction judge, who did not hear the trial testimony, found that Dunbar was a liar and perjurer, but credited his testimony at Respondent's trial when he was testifying under grant of immunity; and when, also under grant of immunity, he recanted the numerous sworn in and out-of-court confessions to the murder.[4] This credibility determination was not based on Dunbar's demeanor, but on the judge's analysis of the physical evidence, and

[4]In stark contrast, Dunbar's admission under oath that he murdered the victim and framed Respondent was given without immunity of any kind.

Dunbar's motives to lie.[5] Pet. App. at A-25-26.

After exhaustively reviewing the facts, however, the Court of Appeals concluded that the record did not fairly support that finding.[6] The physical evidence the state court pointed to--Respondent's fingerprint on the gun case and tape binding the victim's hand, an attache key found in Respondent's property, discarded clothes and boots--is not more consistent with Dunbar's trial testimony and his recanted confession. Id. at A-26-38. That is because all this evidence was tied to Dunbar.[7]

After calling the police, claiming to know who killed the victim (but first demanding immunity for recent burglaries he had committed and a gun he had illegally purchased), Dunbar

---

[5]The state postconviction judge also stated that Dunbar's confession conflicted with the trial testimony of Jackie McCullar and Dennis Stevens, Pet. App. at D-3, but that, too, is not supported by the record. McCullar, Dunbar's step-daughter, testified that Dunbar and Respondent came to her house and Respondent asked her to hold two attache cases, one of which held the loot from the jewelry store that contained Dunbar's fingerprints, not Respondent's. At the postconviction hearing, Dunbar testified that he asked Respondent to ask McCullar to hold the cases. Dennis Stevens, Dunbar's eleven-year-old step-son at the time of trial, had supported his mother's much-needed alibi for Dunbar at Respondent's trial. Dennis, however, recanted that testimony in the state postconviction proceedings, admitting that everything he said was scripted by Dunbar.

[6]As noted, the author of the dissent also agrees that this finding by the state court is not fairly supported by the record. Carriger v. Stewart, 95 F.3d at 759 ("the record does not support the state court's finding that Dunbar's October 1987 testimony is less consistent with the physical evidence and witness testimony than his testimony at trial and in December 1987").

[7]Former Chief Justice Feldman of the Arizona Supreme Court recognized long ago that the case against Respondent rested exclusively on the credibility of Dunbar:

> There was no direct evidence of Carriger's guilt. The case was tried, therefore, on a simple basic issue: Did Dunbar tell the truth when he blamed the robbery and murder on Carriger, or was Carriger's contention that the robbery and murder were committed by Dunbar to be believed?

State v. Carriger, 692 P.2d 991, 1012 (1982)(Feldman, J., dissenting). Justice Feldman was alone in his conclusion that Petitioner's conviction should be reversed (for ineffective assistance of counsel), but the rest of the Arizona Supreme Court Justices agreed on this point: "There is no doubt that Dunbar's testimony was important to the state ...." Id., 692 P.2d at 1007. The State also "candidly concede[d] that ... the key to the case lay in Dunbar's credibility." Id., 692 P.2d at 1014.

gave police jewelry (a ring, a diamond stone, a watch) stolen from the homicide scene.[8] He then took police to the attaché cases containing more stolen jewelry, with his, but not Respondent's, fingerprints on it. Respondent's fingerprint was found on a gun cleaning kit inside the second attaché case. That was not surprising or condemning because it was never disputed that Respondent was with Dunbar when Dunbar purchased the gun and the gun cleaning kit. Pet. App. at A-28.

Dunbar also lead police to clothes and shoes allegedly worn by Respondent during the bloody crime. Although trial testimony revealed a bloody crime scene with blood spattered five feet up the surrounding walls, the clothes Dunbar showed police, including a pair of jeans, had no blood on them. One shoe contained droplets of blood so minuscule it could not be determined whether the blood was even human, much less the victim's. In his sworn confession, Dunbar admitted planting the pair of jeans and having worn the boots.[9]

The state repeatedly trumpeted the fact that a single fingerprint linked to Respondent was found on adhesive tape binding the victim's hands. Like every other item of evidence, however, that tape, too, was linked to Dunbar. Dunbar had access to the roll of used adhesive tape stored in a first aid kit in Respondent's van which would have had Respondent's fingerprint on it.[10] In

---

[8]Dunbar also openly attempted to sell the stolen jewelry all over town shortly after the crime.

[9]Dunbar tried on the boots during the postconviction proceedings and they fit him.

[10]At the 1978 trial, the prosecution experts testified that they could not identify the location of the fingerprint on the wadded tape binding the victim's hands, and the fingerprint could have been present on the roll of tape before it was used to bind the victim's hands. As explained below, in 1987, without notice to anyone, the State removed the trial exhibits containing the wadded tape and the latent fingerprint identified as belonging to Respondent from the court exhibit room. After destroying the wadded configuration of the tape, the State later tried to introduce testimony that the location of the fingerprint could now be identified at a place where Respondent could not have left it prior to the crime. The state court refused to admit this testimony, and did not rely on it in making his credibility determination.

his 1987 confession, Dunbar admitted taking this roll of tape from Respondent's van to the crime scene and using it to bind the victim's hands.

The only other evidence the state court pointed to was a key that opened the attaché case containing the stolen jewelry. This mysterious "second" key[11] was allegedly found on Respondent when he was arrested--but the property envelope prepared by jail personnel at the time Respondent was booked into jail, as well as the testimony of the officer who booked Respondent into jail, established that Respondent had only one key.[12]

Thus, as the Court of Appeals found, every item of evidence fit with the conclusion that Dunbar committed the crime and then used evidence taken from Respondent to frame him for it. A determination that evidence is "as consistent" with one scenario as another, is tantamount to a conclusion that neither of those scenarios has been proved beyond a reasonable doubt.[13]

The Court of Appeals also found record evidence not considered by the state court that

---

[11]It is undisputed that Respondent had a house key to Dunbar's residence at the time of his arrest.

[12]Given Dunbar's long-time history as an informant for the police and the ease with which he handled and handed over at his pleasure stolen property from the robbery-murder, and was never once personally searched by police, or had his home searched, the appearance of the second key in Respondent's jail property shortly before the trial began is not at all surprising. The evidence showed that property for an inmate, including a key, can be sent to the jail through the mail, and that property will be stored by the jail in the inmate's property. Moreover, as the Court of Appeals recognized, what was incriminating was not possession of the key to the attache case containing the stolen jewelry, but the fact that Dunbar's fingerprints were on the jewelry inside the case, not Respondent's. Pet. App. at A-27.

[13]Petitioners contend that because the Court of Appeals concluded that the physical evidence was "as consistent" with Dunbar's confession as with his trial testimony, the state court's finding that Dunbar was credible when he testified at Respondent's trial, but not when he recanted that testimony, is "fairly" supported by the record. Pet. at 12. Ordinarily, that would be true. If Dunbar were believable, a factfinder could have decided to accept his explanations for his possession and knowledge of the physical evidence and conclude beyond a reasonable doubt that Respondent had committed the crime. But the critical point Petitioners miss is this: the record is indisputable, and all the state and federal courts are in agreement, that Dunbar is not believable but "a liar". That is why the state court did not, and could not, rely on his Dunbar's testimony to support his finding, but turned instead to analyzing the physical evidence.

supported Dunbar's confession. Pet. App. at A-28-29. At Respondent's trial, Dunbar testified that he had never been in the back of the jewelry store where the crime occurred. In 1987 when he confessed to murdering the victim and framing Respondent, Dunbar accurately diagramed the back of the jewelry store, the location of the safe, and the location and position of the victim's body when it was found in the bathroom of the store in a way that only a participant in the crime could have done. When Dunbar later recanted his confession, he attempted to explain away his earlier testimony by claiming that Respondent's counsel had earlier shown him diagrams of the store and trial testimony about the crime scene. That testimony was proven false. Pet. App. at A-29.

Also, Dunbar's testimony about the reasons he "falsely" confessed were shown to be untrue. Dunbar testified that his lawyer knew he was testifying falsely when he admitted to being the killer, but that his lawyer had conspired with him to create this fabrication to sell this story and obtain proceeds from the resulting book and movie deals. That, too, turned out to be untrue. Id.

In analyzing Dunbar's other motives to confess, the Court of Appeals concluded that although Dunbar did have some motive to lie because he was angry at his ex-wife and the State, the state court failed to consider the significance of Dunbar confessing under oath without immunity. This was the first, and only, time Dunbar testified without immunity. His confession was based on his belief that he was dying; he said he couldn't face his maker with this sin on his conscience.[14] When Dunbar was later asked to explain why he was recanting his confession, he

[14]Although Dunbar was in fact quite ill at the time, he lingered for another three years. He died in 1991.

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

17-18

maintaining a lie when he was framing someone else for his criminal acts. It considered Dunbar's history of violence and blaming others for his crimes. Pet. App. at A-37.

Without Dunbar, the circumstantial evidence is not sufficient to support a reasonable juror finding beyond a reasonable doubt that Respondent committed this crime. This is especially so in light of Dunbar's numerous statements to friends, family, and others, as well as his court testimony.

Petitioners contend, however, that the Court of Appeals erred by not considering the testimony they proffered in the 1987 state postconviction proceedings in an attempt to demonstrate that the location of Respondent's fingerprint on the wadded tape binding the victim's hands was at a spot where it could have only been placed after the tape was unrolled. Unlike the state court (and the previous Court of Appeals' panel decision), the Court of Appeals did consider that proffer. But for a number of reasons, it gave it "little weight." Pet. App. at A-26-27.[16]

One reason is that Respondent has been unable to examine the tape "in either reconstructed or unreconstructed form, or to have its own expert test the state's criminalist's conclusions." Pet. App. at A-27. Although a court reviewing a claim of miscarriage of justice can consider "the probative force of relevant evidence that was either excluded or unavailable at

---

[16]Although the author of the dissent makes much of this proffered evidence, he did not do so in the Court of Appeals' panel decision which he also wrote. There, the proffered evidence was given no weight. Carriger v. Stewart, 95 F.3d at 761 n.13. In now deciding to give weight to the proffer, the author states that he has "trouble imagining" how a preexisting fingerprint on tape could be exposed when "[t]he usual way of applying tape" to bind an object like "a package" is to overlap the tape as it is being wrapped so that the "second layer of tape [is] on the top of the first." Pet. App. at B-17. Perhaps that perfection is common when one is wrapping packages, but that is not what was achieved when the victim's hands were bound in this messy robbery-murder. The wad of tape revealed anything but perfect binding. Many areas of the layers of tape were exposed in the zigzagging, haphazard binding. That is likely why the state's expert at trial stated that he could not determine the location of the latent on the roll of tape.

trial," due process requires that the evidence at least be reliable. Schlup v. Delo, 513 U.S. at 327-328. The most basic tenet of due process is the right to examine and challenge adverse evidence. See Gardner v. Florida, 430 U.S. 349, 358 (1977); In re Oliver, 333 U.S. 257, 273 (1948). A habeas petitioner "is entitled to know the factual material on which the [decision maker] ... relies for decision so that he may rebut it." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n.4 (1974); see also In re Ruffalo, 390 U.S. 544 (1968).

Despite repeated requests made since Petitioners removed this trial exhibit without notice to, or permission from, the court, or Respondent's counsel, Respondent has not been given a chance to have this handiwork examined by an independent, or defense, expert.[17] When the State first attempted to present this testimony, and Respondent objected to it, the state court excluded it as "irrelevant" and placed no reliance on it.[18] In later state and federal postconviction proceedings when Petitioners tried once again to rely on this "evidence," Respondent again requested, and was denied, permission to test the validity of this experiment.[19]

Another reason the Court of Appeals gave this evidence little weight was the inconsistency of the expert's testimony as to the location of the latent to the end of the roll of tape. While Petitioners complain that the Court of Appeals misread the record, Pet. at 19, the

---

[17]Respondent also objected to the State's expert's destruction of the original configuration of the tape in attempting to "reconstruct" it. The State's expert did this when he tore the wad of tape apart and attempted to piece the strips back together--a task he admitted he had never done before.

[18]This proffered evidence was inconsistent with other evidence as well, including the fact that this was the only latent print found on the wadded tape or roll of tape, and the State's theory at trial was that the robber-murderer wore gloves.

[19]Unlike the state court, however, the District Court, despite inexplicably denying Respondent's request to have that evidence released for independent examination, relied on it in denying Respondent relief. Respondent challenged that action on appeal.

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

21- 24

prison records of key witnesses showing drug use during time they were testifying constituted Brady violation).

This duty to disclose is especially applicable here where Dunbar was known by the prosecution to be a convict, was known by the lead detective to be a long-time informant, was given complete immunity in exchange for his testimony despite the fact that he was tied to all the evidence and the police believed he was involved in the crime. In fact, based on these facts, it is surprising that the prosecution would have offered Dunbar complete immunity without investigating his records.

Petitioners' alternative claim that it should have been excused from the duty of disclosure because Respondent asked his trial counsel to obtain Dunbar's prison file is more plausible legally, but untenable on the record of this case. In fact, it is a reversal of the position taken by the Arizona Attorney General's office in state court, where it argued vociferously that Respondent's counsel could not have obtained Dunbar's prison file if he had tried to:

> Ariz.Rev.Stat.Ann. § 31-221 prohibits the Department from disclosing [prison] files to the public, including inmates and defense attorneys. That statute was in effect at the time of petitioner's arrest and trial, between March and July 1978. In April, 1978, the court of Appeals held that inmates' files were not to be disclosed to him. Ortega v. Holmes, 118 Ariz. 433, 577 P.2d. 741 (Ct.App. 1978).

State v. Carriger, No. CR-101609, States's Memorandum Regarding Post-Conviction Relief Issues, at 1-2 (Oct. 27, 1982).

Moreover, the record also shows that trial counsel did not know the information contained in Dunbar's prison file. While courts have found that where the defendant has specific knowledge of the impeachment or exculpatory evidence, the State is relieved of its independent

duty to disclose that information,[22] they have never relieved the state from its duty to disclose where, as here, counsel has no such specific knowledge. Counsel did not know that Dunbar was a violent sociopath and pathological liar who had a reputation for framing others for his crime. Counsel did not know that Dunbar was a long-time informant for the Phoenix Police Department, and that was why the police did not search him or his home, or that this was why Dunbar was not charged with this crime even though the police considered him a suspect.

The record shows that, although Respondent's trial counsel did precious little to confront Dunbar, the few attempts he did make to discover information about Dunbar were effectively thwarted by the State and its agents. For example, during the trial, the prosecutor moved in limine to preclude defense counsel from "inquiring into past prior bad acts that have not resulted

---

[22]See Routly v. Singletary, 33 F.3d 1279, 1285 (11th Cir. 1994)(where defense counsel learned during deposition that witness had been given immunity in exchange for her testimony and counsel disclosed that fact to jury in his opening statement, and cross-examined witness on immunity agreement, no Brady violation occurred); United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980)(where witness promised nothing in exchange for testimony in North Carolina case, but was promised by prosecutor in Florida case that if witness cooperated in Florida case that fact would be brought to attention of North Carolina judge, and defense counsel was specifically told these facts, witness had no motive for falsifying his testimony in North Carolina case and defense counsel knew all these facts); United States v. Prior, 546 F.2d 1254 (5th Cir. 1977)(letter sent to defendant and contained in defendant's files did not constitute withheld Brady material).

The other cases Petitioners and the dissent rely on for this proposition are equally inapplicable to this case where defense counsel had no knowledge of the contents of the file. See, e.g., Rector v. Johnson, 120 F.3d 551, 560(5th Cir. 1997)(undisclosed statement from clerk at convenience store where defendant was earlier before crime who did not testify at defendant's trial was not relevant or material, and witness could have been discovered by defendant who knew where he was before the crime); United States v. Flores-Mireles, 112 F.3d 337, 340-341 (8th Cir. 1997)(no Brady violation where evidence on tape recordings of controlled buys of illegal drugs which were disclosed to the defense during trial and unidentified latent fingerprint, also disclosed during trial, were not favorable to defendant); United Sates v. Iverson, 648 F.2d 737, 738 (D.C. Cir. 1981)(where record is unclear whether defense counsel knew true facts of sentencing status of principal prosecution witness, remand required); Ross v. Heyne, 638 F.2d 979, 986 (7th Cir. 1980)(where defense counsel knew that co-defendant's testimony denying that he was testifying pursuant to a plea agreement was false but did nothing to correct it because of a conflict of interest, prosecution also knew and also did not correct it, but defendant knew none of this, new trial granted); Hampton v. United States, 504 F.2d 600, 601 (10th Cir. 1974)(where defense informed that cashier's check had been examined by lab but defense did not request results of that exam, no Brady violation occurred); Wallace v. Hocker, 441 F.2d 219, 220 (9th Cir. 1971)(where defense knew liquor bottle left at scene of crime and that defendant made statements after crime indicating his state of intoxication, but did not request production of bottle or statements, no Brady violation).

in convictions," stating:

> [Dunbar] has a series of arrests, a reputed burglar in town. He has been around a long time. The police rap sheet exposed to Mr. Gay that he may or may not have been involved in a lot of other things, although there is not enough evidence to charge him with it.

The prosecutor said nothing about the real reason Dunbar was not charged with his involvement "in a lot of other things": Dunbar worked as a police informant, providing information about the alleged criminal activities of others, in exchange for criminal charges being dismissed, or not pursued, against him.

Later, the prosecutor argued to the court:

> The risk [of allowing defense counsel to cross-examine Dunbar about his nonfelony criminal activity] is this: What they are looking at here is a fellow goes to the police and volunteers information and gets immunity, who has done a burglary and who has told the truth about doing that burglary. [Dunbar's prior bad acts] doesn't impeach him at all. But what it does is creates the idea in their minds that this fellow is going around town doing burglaries. It puts him on [sic] issue.

Of course, the prosecutor knew that is exactly what Dunbar was doing: going around town doing burglaries. But instead of being charged, prosecuted and punished for those crimes, he was "informing" on others and blaming them for his own acts.

In addition, the record at trial reflects the following exchange between defense counsel and the lead detective for the Phoenix police on the case:

> Q. Had you done any investigation as to who Mr. Dunbar might be or what his background was before you went to the meeting with him?
> A. No.
> Q. You didn't know at that time whether he had felony convictions or outstanding warrants or things of that nature?
> A. No, I did not.
> Q. Did you ultimately determine what Mr. Dunbar's background was, in terms of whether he was a convicted felon and that sort of thing?

A. Yes.
Q. What did you discover in that regard?
A. I believe he is a convicted felon, convicted of burglary, as I recall.
...
Q. And did you not also discover, in addition to the fact he was a convicted felon, did he not also concede to you that he was committing or had committed other burglaries in the recent past that he had not been charged with?
A. Yes, he did.
Q. How many additional burglaries did he admit he had committed, other than those he had been convicted for?
A. One.
Q. Did you determine how many felony convictions Mr. Dunbar had for burglary, sir?
A. Convictions, I believe two.
Q. Was Mr. Dunbar arrested or charged with the burglaries that he had admitted to you that he had committed that he had not been charged for or charged with?
A. No, he was not.
Q. Why not, sir?
A. I believe he was granted immunity by the County Attorney's office.
Q. And why?
A. As a witness in this investigation.
Q. Was that immunity granted at your request or did you play any role in the request of the County Attorney to give immunity to Mr. Dunbar?
A. I believe the decision was made by Mr. Rizer of the County Attorney's Office.
Q. Mr. Rizer, being a prosecutor, ultimately that would be his decision, as opposed to the officer's? In other words, you don't have authority to grant immunity?
A. That's true.
Q. Did Mr. Rizer grant immunity to Mr. Dunbar,because you requested that take place, sir?
A. No, I don't believe we requested it. It was justa matter of his deciding that it would be done.
Q. Do you know why that decision was made to grant immunity to that individual?
A. No, I really don't know the total extent, other than the fact that he would be available as a witness.

R.T. 7-12-84 at 14, 18-19.

Nowhere in this lengthy exchange about Dunbar's background and his continuing criminal activity does the detective disclose that Dunbar was a police informant and avoided

felony charges by providing information to the police about the alleged activities of others, and that although the police suspected Dunbar of being involved in this crime, they did not search him or his house. Exh. 16 to Petitioner's Excerpt of Record; Pet. App. at A-18. This same detective instead told the jury that he did not consider Dunbar a suspect in this crime. R.T. 7-12-78 at 16.

We thus submit that the Court of Appeals made no new law, but faithfully applied the rule of Brady and Kyles, in holding that Respondent was denied due process by the State's failure to disclose the information it had which undercut Dunbar's credibility. However, even if it were correct, as Petitioners contend, that it was the fault of trial counsel and not the State that this information was not brought out, Respondent's trial would be nonetheless unconstitutional. The Court of Appeals recognized this, noting that the flip side of the Brady issue in this case was the question of whether Petitioner was denied effective assistance of counsel at trial, an issue that has never been squarely decided by any court because of the procedural bars that have now been overcome by Respondent's showing of actual innocence. See Pet. App. at A-40.[23]

III. IF REVIEW IS GRANTED, THE COURT SHOULD ALSO CONSIDER WHETHER THE COURT OF APPEALS PROPERLY APPLIED THE EIGHTH AMENDMENT RULE RECOGNIZED IN HERRERA V. COLLINS.

For all the reasons given above, this Court should deny Petitioners' request to grant certiorari. Should this Court grant certiorari, however, it should also review the Court of Appeals decision on the standard to be applied in determining a freestanding claim of innocence precluding execution under the Eighth Amendment, of the type recognized by a majority of the

---

[23]Thus, if this Court were to grant certiorari and reverse on this claim, this and other constitutional claims remain to be resolved.

Justices of this Court in Herrera v. Collins, supra.

The Court of Appeals, like most of the lower federal courts, assumed that Herrera forbade the execution of innocent persons.

Pet. App. at A-31. Several opinions in Herrera made up the majority holding this to be so. Herrera v. Collins, 506 U.S. at 419 ("the execution of a legally and factually innocent person would be a constitutionally intolerable event")(O'Connor, J., joined by Kennedy, J., concurring); id. at 431 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting)("[I]t is crystal clear that the execution of an innocent person is `at odds with contemporary standards of fairness and decency.'"); see also id. at 429 (White, J., concurring)("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional [an] ... execution").

This Court did not, however, identify in Herrera the showing needed to establish this claim because it found the petitioner had not made the "extraordinarily high" threshold showing of innocence required to support such a claim. Id., 506 U.S. at 417. The majority opinion stated only that the petitioner would need to make "a truly persuasive demonstration of `actual innocence'". Id.

Respondent argued that he made this showing, and adopted the most demanding of the standards set out by the separate opinions: "that based on the proffered newly discovered evidence and the entire record before the jury that convicted him, `no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.' Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979)." Herrera v. Collins, 506 U.S. at 429 (White, J.,

concurring). This modified Jackson standard strikes the appropriate balance between the principles of finality and comity and society's interest in avoiding the execution of an innocent man. See Addington v. Texas, 441 U.S. 418, 423 (1979). Respondent showed that his guilt could not be found beyond a reasonable doubt without reliance on the testimony of Dunbar--and that no rational finder of fact could rest a criminal conviction on the testimony of Dunbar, who, as the lower state and federal agree, indisputably perjured himself in his testimony in this case (probably more than once) and who the state and federal courts found was a liar.

The Court of Appeals, however, rejected this standard, and instead held that a habeas petitioner must show the "more demanding" standard announced by Justice Blackmun in his dissenting opinion, and offer "affirmative[] pro[of] that he is probably innocent." Pet. App. at A-32. Although apparently agreeing that no reasonable juror could convict Respondent based on this record, the Court of Appeals held this was not enough and that Respondent must present affirmative proof of innocence, "for example, demonstrating he was elsewhere at the time of the murder [or] new and reliable physical evidence, such as DNA, that would preclude any possibility of Carriger's guilt." Id. at A-33.

Unlike Herrera, this case thus squarely presents the question of which of the several tests posited by the opinions in that case governs this important Eighth Amendment question. If the test formulated by Justice White is the correct one, Respondent's showing of innocence should have independently precluded his execution. The utter discrediting of Robert Dunbar now acknowledged by every court, combined with the ambiguity of the circumstantial evidence in light of Dunbar's various confessions and admissions, makes it more than just probable that no jury would convict Respondent; it makes it clear that no rational juror could convict him under

the constitutional test of proof beyond a reasonable doubt.

If the court decides to reexamine that evidence and review the Court of Appeals' application to it of the test of Schlup v. Delo, it should at the same time consider and define the proper test to be applied to claims of innocence under the Eighth Amendment, which was discussed but not resolved by the Court's various opinions in Herrera.

IV. CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Dated this 13th day of April, 1998.

Fredric F. Kay
Federal Public Defender
Denise I. Young
97 E. Congress, Suite 130
Tucson, AZ 85701

Attorneys for Respondent

No. 97-1509

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

TERRY L. STEWART, Director,
Arizona Department of Corrections, et al.

Petitioners,

vs.

PARIS HOYT CARRIGER,

Respondent.

PROOF OF SERVICE

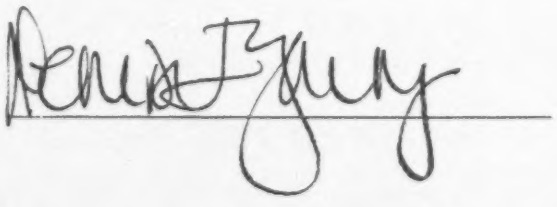
I, Denise I. Young, do declare that on this date, April 13, 1998, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Joseph T. Maziarz
Assistant Attorney General
Office of the Attorney General
1275 W. Washington
Phoenix, AZ 85007-2997
(602) 542-4266

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 13, 1998



EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED

971509 MAR 13 1998

No. ——— OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
AND GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

-VS-

PARIS HOYT CARRIGER,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

JOSEPH T. MAZIARZ
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONER

156P

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARIS HOYT CARRIGER,
Petitioner-Appellant,

v.

TERRY L. STEWART, Director of the Arizona Department of Corrections,
Respondent-Appellee.

No. 95-99025
D.C. No.
CV-95-01617-PGR
OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
March 27, 1997—San Francisco, California

Filed: December 17, 1997

Before: Procter Hug, Jr., Chief Judge, James R. Browning, Mary M. Schroeder, Jerome Farris, Harry Pregerson, Stephen Reinhardt, Alex Kozinski, Ferdinand F. Fernandez, Thomas G. Nelson, Andrew J. Kleinfeld, and Sidney R. Thomas, Circuit Judges.

Volume 1
Opinion by Judge Schroeder;

Volume 2
Dissent by Judge Kozinski

SUMMARY

Criminal Law and Procedure/Habeas Corpus

Sitting en banc, the court of appeals vacated a panel opinion and reversed a judgment of the district court. The court held that on federal habeas corpus, the "miscarriage of justice" exception to the abuse-of-the-writ doctrine allows review of an otherwise-barred assertion of constitutional error tied to the petitioner's claim of actual innocence.

Appellant Paris Carriger was charged in Arizona with capital murder. The State's star witness was Robert Dunbar, who testified under a grant of immunity. Carriger's defense was that Dunbar was the killer, and the pivotal issue in the case was Dunbar's credibility. In closing argument, the prosecutor vouched for Dunbar's credibility, stating repeatedly that Dunbar was not a liar. In fact, Dunbar was well known by state authorities to be a liar, a career burglar, and given to blaming others for his crimes. Carriger was convicted and sentenced to death. The Arizona Supreme Court affirmed.

Carriger commenced state postconviction proceedings. His principal claim was that trial counsel had been ineffective for not investigating Dunbar adequately, and not obtaining Dunbar's corrections file, which revealed that he was an habitual liar with a sociopathic personality. The judge who had presided at Carriger's trial denied relief without a hearing. The Arizona Supreme Court affirmed.

In 1985, Carriger filed a federal habeas corpus petition challenging his conviction and sentence. The district court denied relief.

While Carriger's federal appeal was pending, he filed a second state postconviction petition, this time based on new evidence that Dunbar had lied at trial, bragged of framing

Carriger, and instructed his family to lie to investigators and at trial.

Seriously ill, Dunbar confessed under oath that he was the killer and that he had framed Carriger. Dunbar's wife Joyce also recanted her trial testimony that Dunbar was with her on the night of the murder, testifying that it was false, and that Dunbar had admitted to killing the victim.

Three weeks later, Dunbar wrote to the new postconviction judge and recanted. Recalled to testify, he stated that his trial testimony had been truthful, and that his recent sworn confession was a lie. The trial court denied relief. The Arizona Supreme Court affirmed.

In a second federal habeas corpus petition in 1991, Carriger claimed for the first time that he was entitled to relief because no rational trier of fact could conclude beyond a reasonable doubt that he murdered the victim in light of all the presently available evidence, i.e., that he was actually innocent. The main underpinning for Carriger's claim was Dunbar's recantation in the state postconviction proceedings of his trial testimony.

Carriger also claimed that the state postconviction court erred by failing to consider Dunbar's alleged participation in the murder as a circumstance mitigating Carriger's guilt of the death penalty. His petition included three other claims of constitutional error at trial, in sentencing, and in the state postconviction proceedings.

Citing *Herrera v. Collins*, 113 S. Ct. 853 (1993), the district court denied Carriger's petition, ruling that he was not entitled to federal habeas corpus relief based on a claim of actual innocence. In *Herrera*, the Supreme Court stated that on federal habeas corpus, a petitioner asserting a "freestanding" claim of actual innocence must surmount an

"extraordinarily high" threshold and make a "truly persuasive" showing.

Carriger appealed and obtained a stay of execution. However, the court of appeals rejected his claims.

In 1993, Carriger filed a third state postconviction petition. He proffered new evidence that Dunbar had again confessed to the crime, this time to a cellmate in 1991, just before Dunbar's death. Carriger also contended that the Arizona prosecutor had withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court denied relief, and the Arizona Supreme Court affirmed.

Carriger filed a third federal habeas corpus petition, contending that all of the now-available evidence, including Dunbar's confession and the contents of his corrections file, demonstrated that Dunbar committed the crime, and that Carriger was actually innocent. This was a "freestanding" claim of actual innocence: the evidence established his innocence sufficiently to render his execution unconstitutional, irrespective of any constitutional error at his trial or at sentencing. Carriger also raised claims of constitutional violations at his trial, including the State's suppression of the contents of Dunbar's corrections file, and misconduct by the prosecutor in telling the jury that Dunbar was not a liar.

The district court rejected Dunbar's claim of actual innocence, ruling that his claim of withheld evidence could have been raised earlier, and therefore constituted an abuse of the writ.

A panel of the court of appeals affirmed, albeit expressing doubt about the integrity of the jury's verdict, and suggesting that the State reconsider its decision to execute Carriger. The court granted Carriger's petition for rehearing en banc.

[1] The threshold for a freestanding claim of innocence contemplates a stronger showing than insufficiency of the evi-

dence to convict. The required showing would have to go beyond demonstrating doubt about the petitioner's guilt, and affirmatively prove that he is probably innocent. [2] Requiring affirmative proof of innocence is appropriate because the petitioner is claiming that he is entitled to relief despite a constitutionally valid conviction.

[3] Carriger did not meet this burden. Although the post-conviction evidence he presented cast a shadow of doubt over the reliability of his conviction, nearly all of it served only to undercut the trial evidence, not affirmatively prove Carriger's innocence. Although Dunbar's confession constituted some evidence tending to show Carriger's innocence, the contradictions in Dunbar's stories and his history of lying could not be ignored. The confession itself fell short of affirmatively proving that Carriger more likely than not was innocent.

[4] The constitutional claims Carriger raised could have been raised in his first federal habeas petition, and therefore would ordinarily have been barred under the abuse-of-the-writ doctrine. However, Carriger could have his otherwise-barred claims considered on the merits if his claim of actual innocence was sufficient to bring him within the narrow class of cases implicating a fundamental miscarriage of justice.

[5] The "miscarriage of justice" exception is not an independent avenue of relief. Rather, if established, it functions as a "gateway," permitting a habeas petitioner to have considered on the merits claims of constitutional error that would otherwise be procedurally barred.

[6] The threshold for making out the exception is lower than the "extraordinarily high" threshold for freestanding claims of innocence. A petitioner asserting both innocence and constitutional error need only present evidence of innocence strong enough that a court cannot have confidence in the outcome of the trial, *unless* the court is satisfied that the trial was free of nonharmless constitutional error. [7] To per-

mit consideration of his procedurally barred claims, a petitioner must show that in light of all the evidence, it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt.

[8] Although Carriger did not affirmatively prove his actual innocence sufficiently to satisfy *Herrera*, he showed doubt about the validity of his conviction more than sufficient to permit consideration of his constitutional claims. [9] It was unlikely that any reasonable juror, knowing that Dunbar confessed under oath without immunity to committing the murder, would conclude beyond a reasonable doubt that the murder was committed by Carriger.

[10] Carriger's strongest claim of constitutional error at trial was that the state withheld Dunbar's corrections file, which would have revealed his long history of lying to police and blaming his crimes on others.

[11] The prosecution is required to disclose material exculpatory evidence without request. Evidence is material if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [12] Material evidence includes evidence bearing on the credibility of government witnesses. The need for disclosure is particularly acute when the government presents witnesses who have been granted immunity in exchange for their testimony.

[13] Dunbar was the prosecution's star witness, and was known by police and prosecutors to be a career burglar and a six-time felon, with a criminal record going back to adolescence. When the state decides to rely on the testimony of such a witness, it is the state's obligation to turn over all information bearing on that witness's credibility.

[14] To the extent that defense counsel's failure to request the file was a cause of the state's failure to disclose it, that

failure constituted ineffective assistance of counsel. Either way, Carriger was denied a fair trial. [15] The contents of Carriger's file had to be deemed material. Dunbar's credibility was critical.

[16] The district court erred when it concluded that Carriger had not been prejudiced by the withholding of the information because the jury knew that Dunbar was a burglar testifying with immunity. [17] The only evidence before the jury that Dunbar had lied was his admission that he had falsified a gun-registration form. There was no evidence concerning his long history of falsely blaming others for his misdeeds, or his lifelong history of violence.

[18] The state's claim that the undisclosed information made no difference was severely undercut by the prosecutor's strenuous vouching for Dunbar's truthfulness. Knowing Dunbar's credibility was the key to the case, the prosecutor emphasized to the jury that even though Dunbar was a career burglar, he was truthful.

[19] There was more than a reasonable probability that the outcome of Carriger's trial would have been different had Dunbar's records been disclosed. The result was a verdict not worthy of confidence, and a trial that denied Carriger due process of law. Carriger was entitled to a new trial.

Joined by Judges Farris, Fernandez, T.G. Nelson, and Kleinfeld, Judge Kozinski dissented. He wrote that Dunbar's repudiated recantation was insufficient to warrant habeas corpus review of Carriger's claim of actual innocence.

COUNSEL

Denise I. Young, Arizona Capital Representative Project, Tempe, Arizona, for the petitioner-appellant.

Joseph T. Maziarz, Assistant Attorney General, Phoenix, Arizona, for the respondent-appellee.

OPINION

SCHROEDER, Circuit Judge:

INTRODUCTION

Paris Hoyt Carriger was convicted and sentenced to death for the brutal murder of Robert Shaw in 1978. Shaw was beaten on the head with a skillet and strangled with his own necktie during a robbery of his Phoenix jewelry store. The chief prosecution witness was Robert Dunbar; Carriger's defense was that Dunbar committed the murder.

After the trial and unsuccessful appeal, Carriger learned of documents in the state's records, never disclosed before trial, indicating that Dunbar was a known habitual liar accustomed to blaming others for his own crimes. In our first en banc opinion in the case, we held that Carriger's challenge to his counsel's failure to investigate Dunbar's background came too late. *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc).

After Carriger's first federal habeas corpus petition had been filed, Dunbar actually confessed in open court that he was the murderer and that Carriger was innocent. Despite the passage of a decade since Dunbar's sworn confession, and despite numerous attempts by Carriger to raise the issue, we have not yet considered on the merits the effect of Dunbar's sworn confession on Carriger's continued incarceration and sentence of death.

This habeas proceeding concerns whether Carriger has adequately shown either actual innocence that would foreclose

imposition of the death penalty, or sufficient doubt about his guilt to overcome procedural bars and permit consideration of the merits of his constitutional claims of trial error. The district court and the panel said no. We took the case en banc because of the exceptional importance of the issues concerning whether the state may execute an individual whose guilt is shrouded by doubt and who has raised serious claims of constitutional error at trial. We now hold that we must consider Carriger's claims, and that those claims warrant a new trial.

I. Procedural History

A. Trial and Sentencing

Carriger was tried in July 1978. The physical evidence at trial was not strong. The prosecution's case relied principally on the testimony of Robert Dunbar, who had contacted police the morning following the murder with an offer of information in exchange for immunity. With immunity, Dunbar testified that Carriger had confessed the crime to him immediately after it happened, had described the crime in considerable detail, and had sought Dunbar's help to dispose of the loot and evidence. Nearly all of the physical evidence used at trial was evidence to which Dunbar had led police the morning following the crime.

Carriger was convicted of robbery and murder. His counsel later testified in postconviction proceedings that during his investigation and trial preparation he did not take into account that his client faced the death penalty. At the sentencing phase, counsel presented no mitigation case. The trial judge sentenced Carriger to 99-100 years for the robbery and death for the murder.

B. Appeal

Following sentencing, Carriger dismissed his lawyer and was appointed new counsel. On appeal, Carriger challenged

a number of evidentiary rulings, trial counsel's effectiveness in cross-examining Dunbar, and the constitutionality of Arizona's death penalty statute. The Arizona Supreme Court affirmed. *See State v. Carriger*, 599 P.2d 788 (Ariz. 1979) (*Carriger I*).

C. 1982 State Postconviction Proceedings

In 1982, represented by new counsel, Carriger filed his first petition for state postconviction relief. The judge who had presided at Carriger's trial denied the petition without a hearing. On appeal, the Arizona Supreme Court found that Carriger's counsel at sentencing had been ineffective, and ordered a new sentencing hearing. *See State v. Carriger*, 645 P.2d 816, 820 (Ariz. 1982) (*Carriger II*). The court also ordered that Carriger be given a hearing on his other postconviction claims. *See id.*

Carriger's principal postconviction claim was that his trial counsel had been ineffective for failing to investigate Dunbar adequately and for failing to obtain Dunbar's Department of Corrections file, despite a request from Carriger that he do so. After remand, Carriger for the first time obtained Dunbar's corrections file through court-ordered discovery. The file contained evidence that Dunbar had long been known to state authorities as an habitual liar with a sociopathic personality, who had a lengthy history of burglaries, violence, and attempts at pinning his crimes on others. Counsel called a number of witnesses who testified to Dunbar's reputation as a liar. The trial court resentenced Carriger to death, and denied postconviction relief. R.T. 10/27/82 at 58, Supp. R.T. 10/27/82 at 14.

The Arizona Supreme Court affirmed, ruling that Carriger's claim of ineffective assistance was known to Carriger at the time of his appeal, should have been raised then, and had been waived. *See State v. Carriger*, 692 P.2d 991, 995, 996 (Ariz. 1984) (*Carriger III*). The court also rejected on the merits

claims that Carriger was entitled to a lesser-included instruction under the rule of *Beck v. Alabama*, 447 U.S. 625 (1980), *see Carriger III*, 692 P.2d at 996-97, and that Arizona's death penalty was unconstitutional. *See id.* at 1008-11.

D. 1985: First Federal Habeas

In 1985, Carriger filed his first federal petition for habeas corpus, presenting the claims exhausted in *Carriger III*. The district court granted Arizona's motion for summary judgment. Carriger filed a notice of appeal, but soon after requested that this court stay consideration of his appeal while he pursued a new state postconviction petition, based on newly discovered exculpatory evidence. *See Carriger v. Lewis*, 971 F.2d 329, 331 (9th Cir. 1992) (en banc) (*Carriger IV*) (superseding *Carriger v. Lewis*, 948 F.2d 588 (9th Cir. 1991) (panel opinion)). We granted Carriger's motion and stayed his appeal.

E. 1987 State Postconviction Proceedings

Carriger's second state postconviction petition was based on new information from Dunbar's family and friends indicating Dunbar had lied at trial regarding his whereabouts during the crime, had bragged of framing Carriger, and had instructed his family to lie to investigators and at trial.

By 1987, the judge who had presided at Carriger's trial had retired. At July and August hearings before a new judge, Joyce Stevens (Dunbar's wife at the time of the murder) and her children testified that Dunbar's alibi and Stevens' corroboration of it at trial were false. Stevens also testified that Dunbar left the house that afternoon and upon returning confessed the crime to her. Several witnesses, including a close friend of Dunbar's, testified that Dunbar had bragged of framing Carriger for the crime. Stevens and her children testified that Dunbar was an abusive person who had beaten them, had previously instructed them to lie, and had threatened their lives

if they did not comply. Dunbar then took the stand and denied the allegations of abuse, and stated his trial testimony had been truthful. The evidentiary hearing was continued to permit counsel to investigate further evidence bearing on the credibility of the conflicting testimony given in the July and August hearings.

Not long after his testimony, Dunbar (through his own counsel) contacted Carriger's counsel. Dunbar, imprisoned on an unrelated conviction, was seriously ill. Dunbar said he believed he was dying, wanted to make his peace with God, and then confessed that he had robbed and murdered Robert Shaw, and had framed Carriger.

In October 1987, at the reconvened evidentiary hearing, Dunbar confessed under oath. He described the crime in great detail, and diagrammed the jewelry store, accurately depicting where Shaw's body was found. Dunbar testified that he and Stevens had committed the crime together, and that Stevens had struck the first blow to Mr. Shaw.

Three weeks after his sworn in-court confession, Dunbar wrote to the judge and recanted. Recalled to the stand in December 1987, Dunbar testified that his 1978 trial testimony had been truthful and his recent sworn confession a lie.

In February 1988, the trial court denied postconviction relief. The judge, who had not presided at trial and therefore could make no demeanor comparisons, rejected both Stevens' testimony and Dunbar's confession as incredible, principally because he thought them inconsistent with the trial evidence. The trial court also noted that Stevens recanted her trial testimony after being given immunity, and that Dunbar's confession was short-lived and motivated by claimed desires for money and revenge. *State v. Carriger*, No. CR 101609 (Ariz. Sup. Ct. Feb. 22, 1988). The Arizona Supreme Court affirmed without comment.

F. 1991-92: Second Federal Habeas Proceedings

Carriger then returned to federal court, and sought to raise his claims based on the 1987 state court testimony both in the district court and directly in this court. In a 1992 en banc opinion, we held that Carriger had not followed procedures adequate to give either this court or the district court jurisdiction to consider his new claims. *See Carriger IV*, 971 F.2d at 331. As a result of those jurisdictional rulings, the merits of Carriger's claims based on the 1987 evidence were not considered in the 1991-92 federal habeas proceedings, and, until now, have never been considered by this court.

In the 1992 en banc proceeding, we did finally reach the claims raised in Carriger's first habeas petition, *i.e.*, the claims rejected by the Arizona Supreme Court in *Carriger III*. A divided en banc court rejected Carriger's ineffective assistance claim as procedurally barred, and rejected on the merits his claim of entitlement to a lesser-included instruction under *Beck v. Alabama*, and his challenge to the constitutionality of Arizona's death penalty statute. *See Carriger IV*, 971 F.2d at 333-36.

G. 1993: Third State Postconviction Petition

In 1993 Carriger, again represented by new counsel, filed a third state postconviction petition. His petition was based on new evidence that Dunbar had again confessed the crime, this time to a cellmate in 1991, shortly before Dunbar's death. Carriger also raised numerous other claims, including the claim that the State withheld exculpatory evidence. In 1994, the trial court denied relief. *See State v. Carriger*, No. CR 101609 (Ariz. Sup. Ct. Apr. 11, 1994). The Arizona Supreme Court affirmed without comment in July 1995.

H. The Current Federal Habeas Proceedings

In August 1995, Carriger filed his current petition, in which he argues that all of the now-available evidence, including

Dunbar's confession and the contents of Dunbar's corrections file, demonstrates that Dunbar committed the crime and that Carriger is actually innocent. Carriger also raises serious claims of constitutional violations at his trial, including a claim that the state suppressed the contents of the corrections file and that the government misled the jury when it told them Dunbar was not a liar. The district court rejected Carriger's claim of actual innocence, and held that his claim of withheld evidence could have been raised earlier, and therefore constituted an abuse of the writ. *See Carriger v. Stewart*, No. CIV-95-1617-PHX-PGR, Memorandum of Decision and Order at 10-19, 20-22, (D. Ariz. Nov. 2, 1995).

A panel of this court affirmed the district court's ruling that Carriger had failed either to show that he was actually innocent of the crime or to create a sufficient doubt about the accuracy of the verdict to permit consideration of his otherwise abusive claims. *See Carriger v. Stewart*, 95 F.3d 755, 758-61, 762-63 (9th Cir. 1996) (*Carriger V*). The panel expressed considerable doubt about the integrity of the jury's verdict in light of the present record, and suggested, but did not order, that the state reconsider its decision to execute Carriger. *See id.* at 761. We granted rehearing *en banc*. *See Carriger v. Stewart*, 106 F.3d 1415, 1416 (9th Cir. 1997). We now vacate the panel opinion, and reverse the district court. We hold that Carriger is entitled to a new trial.

II. Facts

A. The Robbery and Murder

In December 1977, Paris Carriger was released from prison, and soon contacted Robert Dunbar, a prison acquaintance. Carriger acquired a van and some tools, and began doing construction work. When he needed a place to stay, Dunbar agreed that Carriger could park his van on Dunbar's property and live in it. On March 12, 1978, Carriger parked

his van next to the house Dunbar shared with his wife, Joyce Stevens, and her children.

The next morning, March 13, Carriger called in sick at work. He then spent the day with Dunbar. The two visited a number of gun shops, and Dunbar eventually purchased a .22 caliber Luger pistol. Because it was illegal for Dunbar, a convicted felon, to purchase a gun, Dunbar lied on the federal gun purchase form, falsely claiming to have no felony convictions. Later in the day, the two visited Shaw's jewelry store, where Dunbar had his watch repaired. After leaving the store, one remarked to the other that the store would be an easy place to "hit." Dunbar testified at trial that Carriger made this remark, though Dunbar later testified in postconviction proceedings that he said it himself.

The men returned to Dunbar's house from Shaw's store between 3:00 and 3:30 p.m., and then went their separate ways. They met again at Dunbar's house between 5:30 and 6:30 that evening. In the interim, the robbery and murder were committed at Shaw's jewelry store.

In their later testimony, Dunbar and Carriger each accused the other of committing the crime. Carriger testified at his 1982 postconviction hearing that upon returning to Dunbar's house shortly after 3:00, Dunbar got into an argument with his wife, at which point Carriger left in his van and went to a nearby restaurant. Carriger testified he then went shopping for jeans, browsed briefly in an adult bookstore, and returned to Dunbar's house. Parking his van, he walked to a nearby convenience store and back, finally returning at about 6:00. Carriger testified that shortly after his return, as he sat in his van listening to the radio, Dunbar showed up. According to Carriger, Dunbar had a guilty look, and was holding a pair of Carriger's boots. Dunbar allegedly told Carriger that Carriger should replace the boots because they were "hot," suggesting Dunbar had worn them during the commission of a crime. Carriger testified that Dunbar then showed Carriger a bag

containing a half dozen watches, and offered the watches to satisfy a debt Dunbar owed Carriger. Carriger refused the offer.

Dunbar, on the other hand, testified at trial that upon returning home sometime after 3:15, he retired for a nap with his wife. He said he was awakened sometime between 5:30 and 6:30 by Carriger, who summoned Dunbar outside. According to Dunbar, Carriger said he had robbed Shaw's jewelry store, and asked for Dunbar's help in getting rid of "this stuff." Dunbar said Carriger took Dunbar outside to his van, where he showed Dunbar an attache case containing jewelry and watches, and asked for Dunbar's help in removing the tags. Dunbar testified that together they removed the tags from the jewelry, and placed the tags in a paper bag. Dunbar also testified that Carriger described how he had tied up Shaw and killed him by beating him with a skillet and then choking him with his own necktie.

Dunbar's and Carriger's stories agree that after they rejoined at Dunbar's house, both knew that at least a robbery had been committed. Shortly afterward, Dunbar and Carriger went out together. Their first stop was the home of Jackie White, Dunbar's stepdaughter, who had recently moved out of Dunbar's house and who had a friendly relationship with Carriger. Carriger gave White two small cases, asking her to hold onto them. One of the cases turned out to be the case for the gun Dunbar had purchased that morning and contained only a gun cleaning kit, holster, and manual. The other case, an attache case, contained most of the stolen jewelry, the gun itself, and ammunition. The gun case and the cleaning kit inside it bore Carriger's fingerprints. The jewelry inside the attache case, however, bore only Dunbar's fingerprints, not Carriger's. The gun yielded no fingerprints.

Carriger and Dunbar then went to a massage parlor. While there, Dunbar produced a loose diamond taken from Shaw's and tried to sell it to a massage parlor employee. Dunbar and

Carriger continued on to a shopping mall, where Dunbar again tried several times to sell pieces of the stolen jewelry that he had with him. While Dunbar showed the jewelry to a number of mall jewelers, Carriger bought new boots. The two then returned to Dunbar's house.

B. Dunbar's Role in the Investigation

The following morning, Dunbar contacted detectives of the Phoenix Police Department and told them he had information regarding the murder and robbery. He also told them he had committed a recent (unrelated) burglary, and wanted immunity in exchange for his information and testimony. Detectives met Dunbar at a mall coffee shop, where Dunbar gave them pieces of jewelry taken during the robbery. He told the detectives that Carriger had committed the robbery and murder, and had asked for Dunbar's help in selling the stolen jewelry and getting rid of the evidence.

Dunbar told the detectives that Carriger might be armed with the handgun Dunbar had purchased the previous day, and that Dunbar considered Carriger to be extremely dangerous. Dunbar said that Carriger would kill police officers if he saw them approaching the residence. At the detectives' request, Dunbar called Carriger with a lie designed to get Carriger out of the house. Once Carriger left Dunbar's house, police pulled his van over and arrested him. Carriger was unarmed and did not resist arrest.

Dunbar also told the detectives he and Carriger had gone driving north of Phoenix the previous evening to dispose of the evidence. According to Dunbar, Carriger threw evidence out the window as Dunbar drove. After arranging the ruse leading to Carriger's arrest, Dunbar retraced his drive of the previous evening accompanied by a homicide detective, and led the detective to evidence discarded along the roadside, including a jacket, gloves, and boots allegedly worn by Carriger during the robbery, business cards from Shaw Jewelers,

Robert Shaw's wallet and driver's license, and the cut-up pieces of Shaw's credit cards. Dunbar also directed police to the home of Ms. White, where they recovered the two cases Carriger had left the previous evening. Finally, Dunbar led police to a pair of jeans in the canal behind Dunbar's house, where he said Carriger had discarded them. The canal was nearly dry and the jeans were partially submerged in a shallow puddle. The jeans had a piece of one inside pocket cut out in a place where Carriger customarily marked his jeans with his name or initials.

One of the detectives who met Dunbar at the mall testified at trial that the detectives took the story Dunbar told them at face value. The same detective stated in a 1994 affidavit that one reason he took Dunbar's word was that he knew at the time that Dunbar was a longtime informant for the Phoenix Police burglary unit. That status was not made known to the defense or brought out at trial. Dunbar's history as an informant, as will be discussed, turned out to be somewhat less than reliable, and the detective who knew of Dunbar's informant status and took his story at face value in 1978 stated in his 1994 affidavit that he now believes Dunbar participated in Shaw's murder. Dunbar was never taken into custody, and neither his person nor his house was ever searched.

C. *The Evidence and Arguments at Trial*

At trial, Dunbar, granted the immunity he requested, was the state's chief witness. He testified that he had been home asleep at the time of the robbery, and that Carriger had awakened him and confessed the crime. Dunbar's wife corroborated Dunbar's testimony that the two had been asleep together between 4:00 and 6:00 that afternoon.

In closing argument, the prosecutor vouched for Dunbar's credibility, stating repeatedly that Dunbar was not a liar. The prosecutor assured the jury that "[i]f there was any indication

of his [Dunbar's] guilt or complicity in this, he would be on trial with him [Carriger]."

In addition to Dunbar's testimony and the physical evidence Dunbar had provided to the police, the state presented two additional pieces of physical evidence against Carriger. The first was a key to the attache case containing the stolen jewelry, which the arresting officer testified was found in Carriger's wallet when he was arrested. The second was a single fingerprint of Carriger's, which was found on the adhesive tape used to bind the wrists of the victim. The tape was the same type as Carriger kept in a first-aid kit in his van.

Because Carriger did not testify at trial, he offered no direct explanation of the key. Defense counsel did introduce evidence showing it was possible to plant a key in Carriger's prison property locker, and suggesting that the only keys in Carriger's possession when he was arrested were keys to his van and Dunbar's house. The defense explanation of the fingerprint was that the tape was Carriger's, and his fingerprint was already on the end of the roll when Dunbar took the tape from Carriger's van and used it to commit the crime.

D. Post-trial Discovery of Dunbar's Corrections File

As a result of court-ordered discovery in the 1982 state postconviction proceedings, Carriger's counsel for the first time obtained Dunbar's corrections file. The file revealed that Dunbar was well known by state authorities to be a liar. Using Dunbar's file, Carriger's 1982 postconviction counsel located prison superintendents, guards and fellow prisoners who testified that Dunbar was a pathological liar, with a reputation for manipulation and deceit well beyond even that expected in the generally dishonest prison environment.

Dunbar's file showed him to be a prolific career burglar, whose career included committing ninety-two burglaries in one six-month period. Most important, the file revealed a pat-

tern of lying to police and shifting blame to others. After one commercial burglary, Dunbar falsely accused police officers of keeping money they recovered from him after his arrest. After another, Dunbar falsely accused the police of lifting his fingerprints from a water glass and then lying about it. Following a third commercial burglary, Dunbar claimed to have found the money lying in the street, and further claimed to have sought and received legal advice before deciding to keep it. Dunbar's pattern when caught lying was to seek a deal with the police as soon as possible. Following a 1976 burglary, Dunbar displayed behavior strikingly similar to his behavior following the 1978 Shaw robbery/murder: immediately after committing the burglary, Dunbar, on his own initiative, approached a police officer with a story to shift the blame for his burglary. Dunbar claimed that he had been robbed, and tried to paint the supposed robber as the one who committed the burglary.

Dunbar's corrections file revealed other facts inconsistent with Dunbar's trial testimony. Although Dunbar had testified that he was "not a robber" and had never used force, violence, or a gun in a burglary, his file contained admissions that he had committed armed robberies of savings and loans, that he had aided and abetted armed robberies of convenience stores, and that he had used a gun in at least one burglary. The file also contained a claim by Dunbar that he had been involved in a shootout with Phoenix police.

Finally, Dunbar's file revealed a long history of violence. Dunbar had been committed to the Arizona State Hospital because of violent rages and threats against his family, including an incident in which he wielded a knife against his parents, threatening to kill them. Dunbar was also dishonorably discharged from the Army for uncontrolled aggressive behavior and physical assaults. A presentence report in the corrections file noted that Dunbar had been found manipulative toward other people, and that he reacted violently when he

didn't get what he wanted. Another report stated that Dunbar had been diagnosed as having a sociopathic personality.

E. Dunbar's Confessions

In 1987, at an evidentiary hearing on Carriger's postconviction petition, Dunbar confessed under oath in open court that he had robbed Shaw's jewelry store and murdered Robert Shaw. He testified that he had committed the crime along with his wife, Joyce Stevens, and that he had framed Carriger to avoid prosecution. At the hearing, Dunbar described the crime in detail, including the layout of the store and the back room where Shaw's body was found. Dunbar accurately described the method of Shaw's death, and the position in which his body was left. He stated that his wife had first struck Shaw with the skillet, but that he then finished Shaw off with the skillet and the necktie. Dunbar stated that he and his wife had worn gloves during the crime, and that he had bound Shaw's wrists using adhesive tape from the first-aid kit in Carriger's van.

Dunbar testified that in the past he had often shifted the blame to others for his own crimes. He said that consistent with his past practice, his thoughts after committing the crime immediately turned to finding someone on whom to pin the blame. That someone, he testified, happened to be Carriger.

Dunbar also confessed the crime in a four-page letter to a woman with whom he corresponded through a prison ministry program. Dunbar's letter described the crime in sufficiently vivid detail that it frightened the ministry correspondent, who stopped her correspondence with Dunbar. The correspondent has declared in an affidavit that she reported the letter to the Arizona Attorney General's office, and was asked to forward the letter to them by mail, which she did. The Attorney General's office never stated whether it received the letter or knows of its whereabouts; the letter itself has never been produced.

Joyce Stevens testified at the 1987 postconviction hearing that Dunbar had confessed the crime to her. Several witnesses testified that after a 1981 television special on capital prisoners had included a profile of Carriger, Dunbar boasted that he had set Carriger up. Larry White, Joyce Stevens' oldest son, also testified that Dunbar once later described to him what it was like to see someone's head crushed with a skillet.

Shortly before his death in 1991, Dunbar again confessed, this time to his cellmate. He told the cellmate that he had killed Robert Shaw so that Shaw could not identify him, and that he had blamed Carriger to avoid taking the "fall."

F. Other Postconviction Evidence Implicating Dunbar

Joyce Stevens testified in 1987 that she had lied at trial when she corroborated Dunbar's alibi that he was napping with her at the time of the robbery. Stevens testified that Dunbar had a common practice of telling the children he was going to take a nap, and then slipping out of the house through a bedroom door leading outside, and committing burglaries while he was supposedly asleep. She stated that Dunbar did just that on the afternoon of March 13, 1978, leaving the house from the bedroom shortly after calling her into the bedroom to join him for a "nap." According to Stevens, Dunbar later told her he had committed the crime. Stevens explained that she had lied at trial out of fear of Dunbar, who had threatened her life and those of her children if she told the truth.[1]

[1]The dissent seizes upon an inconsistency between Dunbar's confession, which stated that he and Joyce committed the murder, and Joyce's recantation, which stated that Dunbar left the house alone. The dissent concludes that Joyce's recantation does not exonerate Carriger but supports the inference that Dunbar and Carriger acted together. There is no basis for this conclusion; the inference that Dunbar acted alone is at least equally plausible. There is no evidence that Dunbar and Carriger acted together to commit the murder.

Several of Stevens' children testified that Dunbar was an abusive and controlling figure, who regularly beat them and instructed them to lie to the prosecution concerning his involvement in this case. Stevens also testified that the day after the robbery, while she was doing the family laundry, she found the clothes Dunbar had worn the previous day, and that there was blood on the pants that she could not get out. She testified that when Dunbar saw the blood-stained pants drying on the porch, he became angry that Stevens had found them, and told her to leave his things alone. He took the pants, and she never saw them again.

Richard Fein, a close friend of Dunbar's, testified in July 1987 that Dunbar had told him several different times that his favored method of getting rid of evidence was to cut it up into pieces and then drive around the desert, disposing of it a little at a time, so it couldn't be connected up. Fein also testified that Dunbar described his technique for maintaining a consistent lie when he was shifting blame for his crimes to others.

Finally, both Stevens and her mother testified that Dunbar had often stated that he would never leave a witness to a crime he had committed.

G. Dunbar's Recantation of His Confession

Dunbar recanted his October 1987 sworn confession in a letter to the judge three weeks later. Recalled to the stand, Dunbar claimed he had falsely confessed because he was angry at Stevens and her children for accusing him, and at the prosecutors and the state because of the length of the unrelated burglary sentence he was then serving and the particulars of his confinement. Dunbar also testified that his attorney was aware Dunbar's confession was false, and that the attorney had conspired with Dunbar to present a false story of a frame-up, in hopes of getting a book or movie deal and splitting the proceeds.

Dunbar claimed that the reason his confession testimony had been accurate and detailed was because Carriger's lawyer had shown him diagrams of the store and transcripts of trial testimony in prehearing meetings with Dunbar. Testimony from Carriger's and Dunbar's lawyers established that Dunbar had been shown no such diagrams or transcripts, and that Dunbar's counsel had had nothing to do with any scheme by Dunbar to testify falsely and profit from it.

Dunbar admitted at the December 1987 hearing that, given the inconsistency of his separate sworn stories, he had necessarily committed perjury in the Carriger case. He also stated that he had lied to prosecutors "in a lot of different cases and places." The trial court found Dunbar's confession was false and his 1978 trial testimony was truthful.

Dunbar died in 1991.

III. The District Court's Decision and Its Deference to the State Court's Credibility Determination

In his current petition, Carriger claims that he is actually innocent of the crime, and that his conviction and death sentence cannot stand because the state failed to disclose exculpatory evidence.[2] The district court denied relief, ruling that: (1) Carriger had not shown actual innocence sufficient either to bar his execution under *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993), or to permit consideration of procedurally barred claims under *Schlup v. Delo*, 115 S. Ct. 851 (1995); (2) Carriger's claim of withheld evidence could have been presented in his first federal habeas petition, and was therefore barred as an abuse of the writ; (3) Carriger had not

[2]Because these claims are sufficient to dispose of Carriger's case, we need not consider his additional claims that he is entitled to resentencing based on a new mitigating circumstance, that he was incompetent to be tried or sentenced, or that his counsel at resentencing was ineffective for failing to raise the competency issues.

shown cause or prejudice entitling him to consideration of the otherwise abusive claim, and (4) the claim of withheld evidence was in any event meritless.

Critical to the district court's conclusion that Carriger had not met the "miscarriage of justice" standard outlined in *Schlup* was the court's deference to the Arizona court's rejection of Dunbar's 1987 confession and Joyce Stevens' 1987 testimony implicating Dunbar. The district court noted that the Arizona court found both Dunbar's confession and Stevens' testimony incredible, and that witness credibility findings are factual determinations entitled to deference by federal courts if they are fairly supported by the record. *See Carriger v. Stewart*, No. CIV-95-1617-PHX-PGR, Memorandum of Decision and Order at 15-16 (D. Ariz. Nov. 2, 1995) (citing *Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S. Ct. 843, 850-51 (1983)).

Dunbar's sworn confession is the most dramatic piece of evidence exonerating Carriger. Before reaching Carriger's claims, we consider first whether we may rely in any part on Dunbar's confession, or whether the district court correctly deferred to the state court's rejection of the confession.

We must defer to the state court's credibility finding unless the finding is not fairly supported by the record considered as a whole. *See* 28 U.S.C. § 2254(d)(8) (1994)[3]; *Marshall v. Lonberger*, 459 U.S. 422, 432-35, 103 S. Ct. 843, 849-51 (1983). The Arizona court's credibility determination, made in 1988 by a judge who had not been the trial judge, was based on the court's conclusions that the physical evidence at

[3]Because Carriger's petition was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the "Act"), we apply § 2254(d)(8) as it existed prior to its amendment by the Act. *See Jeffries v. Wood*, 114 F.3d 1484, 1495-96 (9th Cir. 1997) (en banc); *accord Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997) ("[T]he new provisions of chapter 153 generally apply only to cases filed after the Act became effective.").

trial was consistent with Dunbar's trial testimony and inconsistent with his confession, and that Dunbar had motivations to lie in 1987.

With regard to the evidence at trial, the state court pointed specifically to "[Carriger]'s fingerprint on the tape binding the victim's hands, the attache case key found in Petitioner's property, the discarded clothes with the inside pockets removed where Carriger customarily placed his initials, Carriger's prints on the gun case, and the boots worn during the robbery which a number of witnesses in previous proceedings testified belonged to Petitioner." *See State v. Carriger*, No. CR 101609, slip op. at 5-6 (Ariz. Sup. Ct. Feb. 22, 1988).

Close examination of this evidence in the context of the entire course of proceedings, however, reveals that each piece of evidence is as consistent with Dunbar's confession as it is with his trial testimony. We look at each in turn:

> *The fingerprint on the tape.* Dunbar explained that he had taken the adhesive tape, used to bind Shaw's hands, from Carriger's van. The tape belonged to Carriger, and this would explain Carriger's fingerprint on the tape. Had Carriger left the print while binding the victim, as the state contends, it is difficult to understand how he could have left only one print. The State points to an offer of proof made at the 1987 hearing, in which a criminalist testified that he had reconstructed the tape and determined that Carriger's fingerprint was located some 21 inches from an end of the tape. This testimony suggests that the print was left during the binding of Shaw's hands.
>
> Cross examination was able to bring out an internal inconsistency in the expert's testimony: the expert stated he could piece together all of the segments of tape cut from the victim's wrists by matching the

irregularity of the edges, but admitted he could not match either end of the reconstructed tape to the end of the roll. The state court did not admit the criminalist's testimony into evidence, and made no findings as to its relationship. The defense never had an opportunity to examine the tape, in either reconstructed or unreconstructed form, or to have its own expert test the state's criminalist's conclusions. Although we may consider the offer of proof in our inquiry, we find no basis to conclude the criminalist's conclusions are reliable and therefore determine they should be accorded little weight.[4]

The attache case key. Dunbar testified that he gave Carriger the attache case to give to Jackie White to hold; he did not explain what he did with the key. He may have given Carriger the key as well.

Alternatively, Dunbar and Carriger may both have had keys to the case. The state court ignored the uncontradicted evidence that the fingerprints on the jewelry inside the case were Dunbar's, not Carriger's.

The discarded clothes. Dunbar testified in his confession that the clothes he led the police to were the clothes he, Dunbar, had worn during the robbery. Nothing establishes that the clothes had been worn by Carriger, rather than Dunbar. (Postconviction evidence established they fit both men.) Additionally,

[4]The dissent argues that this offer of proof is "the single most damning piece of proof," *infra* at 14675, and concludes that even after disregarding Dunbar's testimony, "reasonable jurors . . . could and would still find plenty on which to convict Carriger," *infra* at 14670. We do not agree with the assumption that the reconstruction is reliable or that our test under *Schlup* is to decide how a hypothetical jury would regard each bit of new evidence. Our task is to determine whether confidence in the actual verdict is undermined. *Schlup*, 115 S. Ct. at 861.

when he confessed, Dunbar stated he planted Carriger's jeans in the canal before leading police to them. No blood was found on the jeans, despite evidence at trial that blood would likely have spattered on the killer's pants. The canal was nearly dry at the time.

Carriger's fingerprints on the gun case. It is undisputed that Carriger and Dunbar were together when Dunbar bought the gun. There is no reason Carriger's prints would not have been on the gun case.

The discarded boots. Carriger does not dispute the boots were his. He testified in 1982 that Dunbar wore the boots during the crime. Postconviction testimony established that the boots fit Dunbar. In his confession, Dunbar testified that he discarded the clothes he wore during the crime, including the boots, and then, with the police along, re-collected them and said Carriger had worn them. The boots are no more consistent with Carriger's guilt than with Dunbar's.

Much of the other physical evidence at trial undercuts Dunbar's trial testimony, and supports Dunbar's guilt. First, it is significant that all of the stolen jewelry was in Dunbar's possession, not Carriger's. There was no connection between any of the stolen jewelry and Carriger, other than Carriger's having handed the attache case to Jackie White, and this Dunbar later testified he asked Carriger to do. To explain why the stolen jewelry in the attache case bore only his fingerprints, not Carriger's, Dunbar claimed that he and Carriger sat together in Carriger's van removing the tags. If Carriger did this without leaving fingerprints on the jewelry, while Dunbar did leave prints, Carriger must have worn gloves while Dunbar did not. Yet Dunbar said nothing at trial about Carriger wearing gloves to remove the tags, despite being questioned specifically about what Carriger was wearing while they

removed the tags, and whether he had ever seen Carriger wear gloves. Moreover, if Carriger wore gloves, it is implausible that Dunbar would not have seen them and done the same.

There is other significant evidence supporting the credibility of Dunbar's confession that was not considered by either the state court or the district court. First, when he confessed to the crime in 1987, Dunbar was able to diagram Shaw's jewelry store in detail, including the location of the safe and the layout of the back room, and was able to depict accurately the location and position in which Shaw's body was found in the bathroom in back of the store. Dunbar could only have known those details if he had participated in the crime.

His knowledge was never adequately explained by any other evidence. According to Dunbar's trial testimony he had never been in the back of the store. Dunbar's December 1987 explanation that Carriger's counsel had shown him diagrams of the store and transcripts of trial testimony was shown to be false. Testimony from all others present at counsel's meetings with Dunbar established that Dunbar was lying and had been shown no diagrams or transcripts. (During his 1987 in-court confession, Dunbar also testified that he had never seen any diagrams, and that his recollection of the store interior was independent.) Dunbar's recollection of details only a participant in the crime could have known is strong evidence that his confession was truthful, and his trial testimony false.

Second, Dunbar's December 1987 recantation of his confession was itself rife with inconsistencies and false statements. In addition to lying about having been shown diagrams and transcripts, Dunbar claimed that his lawyer had conspired with him to sell a false frameup story and split the book and movie proceeds. Testimony from Dunbar's lawyer, as well as inconsistencies in Dunbar's story, established that Dunbar's lawyer had had nothing to do with any such plan, and that selling the story had been Dunbar's idea. When asked to

explain inconsistencies in his story, Dunbar was vague and evasive, twice resorting to claims of recent mental problems.

Finally, when he confessed the Shaw murder in October 1987, Dunbar testified with no immunity of any kind. He acknowledged on the stand that by confessing, he was opening himself to prosecution for capital murder and a possible sentence of death. By contrast, both at trial and when he recanted his confession in December 1987, Dunbar testified with a grant of testimonial immunity. Asked in December 1987 why he had decided to retract his confession, Dunbar replied, "I don't believe I recall the exact reason other than I don't really want to be prosecuted for murder. I don't want to go on death row." Dunbar's admission that he recanted to avoid prosecution makes the recantation highly suspect, while the fact that he confessed without immunity and overwhelmingly against his own penal interest is a strong indicator of reliability. *See Williamson v. United States*, 512 U.S. 594, 599, 114 S. Ct. 2431, 2435 (1994) (discussing Fed. R. Evid. 804(b)(3)); *accord* 5 Wigmore on Evidence, §§ 1457, 1477 (Chadbourn rev. 1974).

It is true that Dunbar did not stand by his confession very long, and that Dunbar's anger at Stevens and at the prosecution gave him some motivation to lie in 1987. There is virtually no other support for the state court's rejection of Dunbar's confession. Much of the physical evidence, Dunbar's history, and the testimony of other witnesses cuts against it. The entire record, viewed as a whole, does not fairly support the state court's determination that Dunbar was more credible at trial. On the contrary, the record strongly suggests that Dunbar's post-trial confession was more reliable than either his trial testimony or his December 1987 recantation. Under 28 U.S.C. § 2254(d)(8), because the state court's credibility determination is not fairly supported by the record as a whole, it is not entitled to a presumption of correctness. We therefore consider Dunbar's confession as at least some evidence supporting Carriger's claims.

IV. Carriger's Freestanding Claim of Actual Innocence: Herrera v. Collins

Carriger's first contention in his petition and on appeal is that all of the evidence now available establishes that he is actually innocent of the Shaw robbery and murder. Carriger argues that the evidence sufficiently establishes his innocence to render his execution unconstitutional, irrespective of any constitutional error at his trial or sentencing. This is a "freestanding" actual innocence claim like that discussed in *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993), where a majority of the Supreme Court assumed, without deciding, that execution of an innocent person would violate the Constitution. A different majority of the Justices would have explicitly so held. *Compare id.* at 417, 113 S. Ct. at 869 (majority opinion) *with id.* at 419, 113 S. Ct. at 870 (O'Connor, J., joined by Kennedy, J., concurring) *and id.* at 430-37, 113 S. Ct. at 876-79 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting).

In *Herrera*, the Supreme Court did not specify what showing would be required for a habeas petitioner to make out a successful freestanding claim of actual innocence. The Court stated only that the threshold would be "extraordinarily high," and that the showing would have to be "truly persuasive." *Herrera*, 506 U.S. at 417, 113 S. Ct. at 869; *accord id.* at 426, 113 S. Ct. at 874 (O'Connor, J., concurring). The Court found it unnecessary to be more specific, because Herrera's showing was unconvincing under any standard. *See id.* at 417-19, 113 S. Ct. at 869-70; *accord id.* at 424-27, 113 S. Ct. at 873-74 (O'Connor, J., concurring).

In this appeal, Carriger argues that he is entitled to relief because "no rational finder of fact could convict beyond a reasonable doubt in light of all the presently available evidence." Carriger thus urges us to adopt the standard discussed in Justice White's concurring opinion in *Herrera*. Justice White, assuming with the majority that a freestanding claim of inno-

cence could entitle a habeas petitioner to relief, stated that the required showing would have to be, at the bare minimum, the same as that required to invalidate a conviction because of insufficient evidence under *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2792 (1979), taking into account *all* the evidence, including both the newly proffered evidence and the evidence at trial. *See Herrera*, 506 U.S. at 429, 113 S. Ct. at 875 (White, J., concurring in the judgment). Justice White, however, addressed only the minimum required showing; he did not find it necessary to decide finally what the threshold would be. *See id.* Moreover, Justice White did not speak for a majority.

[1] We conclude that the *Herrera* majority's statement that the threshold for a freestanding claim of innocence would have to be "extraordinarily high," *id.* at 417, 113 S. Ct. at 869; *accord id.* at 426, 113 S. Ct. at 874 (O'Connor, J., concurring), contemplates a stronger showing than insufficiency of the evidence to convict. We therefore decline to adopt the modified *Jackson* standard. We believe that the required showing would have to be at least as high as the more demanding standard articulated by Justice Blackmun in his *Herrera* dissent. Justice Blackmun stated that to be entitled to relief, a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent. *See Herrera*, 506 U.S. at 442-44, 113 S. Ct. at 882-83 (Blackmun, J., dissenting).

[2] Requiring affirmative proof of innocence is appropriate, because when a petitioner makes a freestanding claim of innocence, he is claiming that he is entitled to relief despite a constitutionally valid conviction. As Justice Blackmun explained,

> conviction after a constitutionally adequate trial strips the defendant of the presumption of innocence. The government bears the burden of proving the defendant's guilt beyond a reasonable doubt, but

> once the government has done so, the burden of proving innocence must shift to the convicted defendant. The actual-innocence inquiry is therefore distinguishable from review for sufficiency of the evidence, where the question is not whether the defendant is innocent but whether the government has met its constitutional burden of proving the defendant's guilt beyond a reasonable doubt. When a defendant seeks to challenge the determination of guilt after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence, not just raising doubt about his guilt.

Herrera, 506 U.S. at 443, 113 S. Ct. at 882-83 (Blackmun, J., dissenting); *accord id.* at 399-400 & 407 n.6, 113 S. Ct. at 860 & 864 n.6 (majority opinion) (noting that a valid conviction strips petitioner of the presumption of innocence and attaches a presumption of guilt). In light of the presumption of guilt that attaches after a constitutionally valid conviction, "it is fair to place on [a petitioner asserting a *Herrera* claim] the burden of proving his innocence, not just raising doubt about his guilt." *Id.* at 443, 113 S. Ct. at 883 (Blackmun, J., dissenting).

[3] Carriger has not met this burden. Although the postconviction evidence he presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove Carriger's innocence. Carriger has presented no evidence, for example, demonstrating he was elsewhere at the time of the murder, nor is there any new and reliable physical evidence, such as DNA, that would preclude any possibility of Carriger's guilt. Although Dunbar's confession exonerating Carriger does constitute some evidence tending affirmatively to show Carriger's innocence, we cannot completely ignore the contradictions in Dunbar's stories and his history of lying. Accordingly, the confession by itself falls short of affirma-

tively proving that Carriger more likely than not is innocent. Carriger's freestanding claim of actual innocence must fail.

V. The "Miscarriage of Justice" Gateway: Schlup v. Delo

[4] Unlike the petitioner in *Herrera*, Carriger accompanies his claim of actual innocence with substantial claims of constitutional violations at trial. The constitutional claims Carriger raises could have been raised in his first federal habeas petition in 1985, and therefore would ordinarily be barred under the abuse of the writ doctrine. *See McCleskey v. Zant*, 499 U.S. 467, 490, 111 S. Ct. 1454, 1468 (1991). Carriger may have his otherwise-barred claims considered on the merits, however, if his claim of actual innocence is sufficient to bring him within the "narrow class of cases . . . implicating a fundamental miscarriage of justice." *Schlup v. Delo*, 115 S. Ct. 851, 861 (1995) (quoting *McCleskey*, 499 U.S. at 494, 111 S. Ct. at 1470).

[5] The terminology in this area is sometimes confusing, because the "miscarriage of justice" exception, like the freestanding claim in *Herrera*, has been described as a showing of "actual innocence." *See Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649 (1986) (requiring petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent"). But unlike a *Herrera* claim, the "miscarriage of justice" exception is not an independent avenue to relief. Rather, if established, it functions as a "gateway," permitting a habeas petitioner to have considered on the merits claims of constitutional error that would otherwise be procedurally barred. *See Schlup*, 115 S. Ct. at 861; *Herrera*, 506 U.S. at 404, 113 S. Ct. at 862.

[6] In *Schlup*, the Supreme Court explained that the threshold for making out the "miscarriage of justice" exception is lower than the "extraordinarily high" threshold for freestanding (*Herrera*) claims of innocence, for two reasons. First, the

"miscarriage of justice" exception does not itself provide an independent basis for relief. The basis for relief is the claimed underlying constitutional violations. More important, because a petitioner claiming he falls within the miscarriage of justice exception asserts constitutional error at trial, his conviction is not entitled to the same degree of respect as one concededly free of constitutional taint. *See Schlup*, 115 S. Ct. at 861. Accordingly, a petitioner asserting both innocence and constitutional error "need carry less of a burden" with respect to innocence than a petitioner like Herrera who claimed only innocence. *See id.* While a petitioner making a *Herrera* claim must present evidence of innocence so strong that his execution would be " 'constitutionally intolerable' *even if* his conviction was the product of a fair trial," a petitioner making a miscarriage of justice claim need only present evidence of innocence strong enough "that a court cannot have confidence in the outcome of the trial *unless* the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* (second emphasis added). In the latter case, "the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id.*

[7] The Court in *Schlup* went on to precisely articulate the showing a petitioner must make to pass through the gateway. The Court held that to permit consideration of his procedurally barred claims, a petitioner must show that in light of all the evidence, including new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 115 S. Ct. at 867. The Court emphasized that in considering all the available evidence, the court is not bound by the rules of admissibility, but must consider "all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." *Id.* (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)).

The dissent incorrectly assumes that in order to prevail on a *Schlup* claim, Carriger must prove that he is actually innocent. As the Court wrote in *Schlup*, "[Schlup's] constitutional claims are based not on his innocence, but rather on his contention that . . . the withholding of evidence [citation omitted], denied him the full panoply of protections afforded to criminal defendants by the Constitution." *Schlup v. Delo*, 115 S. Ct. 851, 860 (1995). Therefore, the petitioner is required to present "evidence of innocence" such that "a court cannot have confidence in the outcome of the trial." *Id.* at 861. In other words, the claim is procedural, not substantive as the dissent suggests. *See id.* at 860 ("Schlup's claim of innocence . . . is procedural, rather than substantive."). The *Schlup* Court contrasted this showing with that required under a *Herrera* claim in which the court must find that the "new facts unquestionably establish Schlup's innocence." *Id.* at 862.

[8] Although Carriger has not affirmatively proved his actual innocence sufficiently to satisfy *Herrera*, we believe he has more than shown sufficient doubt about the validity of his conviction to satisfy *Schlup* and permit consideration of his constitutional claims. It is more likely than not that no reasonable juror hearing all of the now-available evidence would vote to convict Carriger beyond a reasonable doubt. *See Schlup*, 115 S. Ct. at 867-68.

[9] Considering Dunbar's confession along with the other evidence, which points as directly to Dunbar as to Carriger, we conclude that Carriger has met the *Schlup* standard. It is unlikely that any reasonable juror, knowing that Dunbar, without immunity, confessed under oath to committing the murder, would nonetheless conclude beyond a reasonable doubt that the murder was committed by Carriger. We are even more certain that no reasonable juror would vote to convict Carriger beyond a reasonable doubt, if such a juror knew:

- that Dunbar, in his sworn confession, accurately described details about the crime and the crime scene that only a participant could have known;

- that Dunbar's confession explained why Carriger's fingerprint was on the tape, although Carriger was not there;

- that Dunbar had boasted in front of friends and family members that he set Carriger up;

- that Dunbar had described to a close friend how he liked to dispose of evidence by cutting it up and discarding it bits at a time while driving around the desert, as was done in this case;

- that Dunbar had described to the same friend his technique for consistently maintaining a lie when blaming a crime on someone else;

- that Dunbar had told Stevens' oldest son how gruesome it was to see someone's head crushed with a skillet; and

- that Dunbar had a long history, known to state authorities, of violence, lying to police, and trying to pin his crimes on others.

Because Carriger has satisfied the *Schlup* gateway standard, we may consider the merits of his otherwise-abusive claims of constitutional error at trial. We therefore turn to the dispositive constitutional claim.

VI. Carriger's Claim of Constitutional Error at Trial: Brady v. Maryland; Giglio v. United States

[10] Carriger's strongest claim of constitutional error at trial is that the state withheld Dunbar's Department of Correc-

tions file, which would have revealed Dunbar's long history of lying to police and blaming his crimes on others. Carriger argues the state was obligated, under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972), to disclose to the defense this critical information bearing on Dunbar's credibility.

[11] The prosecution is obligated by the requirements of due process to disclose material exculpatory evidence on its own motion, without request. *See Kyles v. Whitley*, 115 S. Ct. 1555, 1565 (1995); *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). Evidence is material, and must be disclosed, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 115 S. Ct. at 1565; *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383. A "reasonable probability" does not require showing by a preponderance that the outcome would have been different. *See Kyles*, 115 S. Ct. at 1565-66. Rather, a " 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383.

[12] Material evidence required to be disclosed includes evidence bearing on the credibility of government witnesses. *See Bagley*, 473 U.S. at 676, 105 S. Ct. at 3380; *Giglio*, 405 U.S. at 154-55, 92 S. Ct. at 766. The need for disclosure is particularly acute where the government presents witnesses who have been granted immunity from prosecution in exchange for their testimony. We have previously recognized that criminals who are rewarded by the government for their testimony are inherently untrustworthy, and their use triggers an obligation to disclose material information to protect the defendant from being the victim of a perfidious bargain between the state and its witness. We said that informants granted immunity are

> [b]y definition . . . cut from untrustworthy cloth[,] and must be managed and carefully watched by the

> government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. . . . Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by *Giglio* to turn over to the defense in discovery *all* material information casting a shadow on a government witness's credibility.

United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir. 1993).

The record is not conclusive as to whether the individual prosecutors in this case ever actually possessed Dunbar's corrections file. The prosecutor's actual awareness (or lack thereof) of exculpatory evidence in the government's hands, however, is not determinative of the prosecution's disclosure obligations. *See Kyles*, 115 S. Ct. at 1567-68. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. *See id.*, at 1567. Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned. *See id.* at 1568. The disclosure obligation exists, after all, not to police the good faith of prosecutors, but to ensure the accuracy and fairness of trials by requiring the adversarial testing of all available evidence bearing on guilt or innocence. *See id.*, at 1568-69; *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97.

[13] In this case, Dunbar was the prosecution's star witness, and was known by police and prosecutors to be a career

burglar and six-time felon, with a criminal record going back to adolescence. When the state decides to rely on the testimony of such a witness, it is the state's obligation to turn over all information bearing on that witness's credibility. *See Giglio*, 405 U.S. at 154, 92 S. Ct. at 765; *Bernal-Obeso*, 989 F.2d at 333-34. This must include the witness's criminal record, including prison records, and any information therein which bears on credibility. The state had an obligation, before putting Dunbar on the stand, to obtain and review Dunbar's corrections file, and to treat its contents in accordance with the requirements of *Brady* and *Giglio*.

[14] To the extent defense counsel's failure to request the file was a cause of the state's failure to disclose it, that failure constituted clear ineffective assistance of counsel. Either way, Carriger was denied a fair trial. We do not independently consider the ineffective assistance of counsel issue because the Supreme Court has clarified that the state's *Brady* obligations do not depend upon the defense's discovery requests. *See Kyles*, 115 S. Ct. at 1565; *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383.

The question thus becomes whether the file's contents are "material," *i.e.*, whether there is a reasonable probability that disclosure of the file would have led to a different result at trial. *See Kyles*, 115 S. Ct. at 1565. In deciding whether the withheld evidence satisfies this standard, we evaluate its effect cumulatively, not item-by-item. *See id.* at 1567.

[15] The contents of the Dunbar file must be deemed to be material. Dunbar's credibility was critical. As Justice Feldman of the Arizona Supreme Court explained in 1984,

> Dunbar was the state's only direct witness. . . . There was no direct evidence of Carriger's guilt. The case was tried, therefore, on a simple basic issue: Did Dunbar tell the truth when he blamed the robbery and murder on Carriger, or was Carriger's contention

> that the robbery and murder were committed by Dunbar to be believed? All other issues were peripheral.

Carriger III, 692 P.2d at 1012 (Feldman, J., dissenting).

At trial the prosecution, while acknowledging Dunbar to be a career burglar and convicted felon, nonetheless painted him as a nonviolent and truthful man. Dunbar testified, unrebutted, that he was not capable of murder, that he was not a robber, and that he had never used force, violence, or a gun in any burglary. Most important, the prosecutor argued at length in closing that Dunbar was not a liar ("He is a burglar, he is a crook. . . . He is a lot of things but he is not a liar."). Further vouching for Dunbar's credibility, the prosecutor assured the jury that "[i]f there was any indication of his [Dunbar's] guilt or complicity in this, he would be on trial with him [Carriger]."

While the above picture was painted at trial, the undisclosed information in the state's files showed:

- that Dunbar had been committed to the Arizona state hospital because of violent rages and threats against his family;

- that Dunbar had brandished a knife at his parents and threatened to kill them;

- that Dunbar was dishonorably discharged from the Army for uncontrolled aggressive and physically assaultive behavior;

- that Dunbar had in the past falsely accused police officers of keeping money they recovered from him after arresting him for burglary;

- that Dunbar had falsely denied a burglary and falsely accused the police of lifting his fingerprints from a water glass and lying about it;

- that Dunbar admitted he had been involved in a shootout with a Phoenix policeman;

- that Dunbar had stated he had committed armed robberies of savings and loans in Phoenix and California;

- that Dunbar had also denied ever being involved in bank robberies;

- that Dunbar had been found by authorities to be manipulative toward other people, and that he reacted violently when he didn't get what he wanted;

- that a psychiatrist had diagnosed Dunbar as having a "sociopathic personality";

- that Dunbar had aided two armed robberies of convenience stores, and admitted conspiracy in those robberies;

- that Dunbar had used a gun in at least one burglary; and

- that after committing a 1976 commercial burglary, Dunbar had immediately approached police on his own initiative and attempted to blame the burglary on another.

The defense never received, and the jury never heard, any of this information. In addition, the jury did not know that the state's files showed Dunbar committed ninety-two admitted burglaries in the six months following his release from his

first burglary sentence. Had this evidence of Dunbar's prolificacy in his profession been known, the defense could have used it to question the thoroughness or good faith of an investigation that did not include Dunbar as a suspect. *See Kyles*, 115 S. Ct. at 1571-72.

The evidence revealed in Dunbar's file need not have been independently admissible to have been material. Evidence is material if it might have been used to impeach a government witness, because "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676, 105 S. Ct. at 3380; *accord Giglio*, 405 U.S. at 154, 92 S. Ct. at 766; *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . ."); *see also Kyles*, 115 S. Ct. at 1571-74 (discussing impeaching uses of undisclosed evidence). As we have observed, "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination." *Bernal-Obeso*, 989 F.2d at 335. It is for precisely that reason that we require "that relevant evidence bearing on the credibility of an informant-witness be timely revealed" to the defense. *Id.*

[16] The district court erred when it concluded that Carriger had not been prejudiced by the withholding of the information because the jury already knew Dunbar was a burglar testifying with immunity. The telling evidence that remained undisclosed included the length of Dunbar's record of burglaries, and, more important, his long history of lying to the police and blaming others to cover up his own guilt.

[17] The district court also noted that the jury had already heard "a wealth of negative information about Dunbar's veracity." However, the only evidence before the jury that Dunbar had lied was his admission that he had falsified the gun registration form. There was no evidence concerning his

long history of falsely blaming others for his misdeeds. Furthermore, although the jury heard Dunbar admit he had once slapped his stepdaughter, they heard no evidence of Dunbar's lifelong history of violence. The latter evidence, had it been disclosed, would have been relevant to Carriger's defense that Dunbar did it, and to the related issues of the quality of the investigation, and the decision not to charge Dunbar.

We have held that the government cannot satisfy its *Brady* obligation to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative. *See Bernal-Obeso*, 989 F.2d at 335. Rather, the government is obligated to disclose "*all* material information casting a shadow on a government witness's credibility." *Id.* at 334 (emphasis in original).

[18] In this particular case the state's claim that the undisclosed information made no difference is severely undercut by the prosecutor's strenuous vouching for Dunbar's truthfulness in closing argument. The prosecutor acknowledged that the whole case came down to whether Dunbar was telling the truth, or whether, as Carriger contended, Dunbar did it and framed Carriger. R.T. 7/25/78 at 464. Knowing Dunbar's credibility was the key to the case, the prosecutor emphasized to the jury that even though Dunbar was a career burglar, he was a truthful man:

> [H]e is a smart cookie, he is a burglar, he is a crook. He is not a liar. Remember when the probation officer was on the stand. Did you ever catch him in a lie—never. Ever catch him in a lie—no. . . . What I am trying to put across, I don't want you [the jury] to get in the position of falling to that kind of logic, letting a murderer go because he is taking pot shots at our star witness. That is the important thing to remember. If there was any indication of his [Dunbar's] guilt or complicity in this, he would be on trial with him.

> Remember, I asked him on the stand, what did I tell you is going to happen to you if you tell a lie, what did I tell you is going to happen to you, what is the penalty for lying in a perjury case? He knew right away, ladies and gentlemen, he did not lie to you. He is a lot of things but he is not a liar.

Id. at 463-64. Entirely apart from being itself improper conduct, *see United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 1048 (1985); *Berger v. United States*, 295 U.S. 78, 88-89, 55 S. Ct. 629, 633 (1935), the prosecutor's vouching underscores the centrality of Dunbar's credibility.

[19] We conclude that there is more than a reasonable probability that the outcome of Carriger's trial would have been different had Dunbar's records been disclosed. The result was a verdict not worthy of confidence and a trial that denied Carriger due process of law. Carriger is entitled to a new trial.

The panel opinion, 95 F.3d 755, is VACATED.

The district court's judgment is REVERSED AND REMANDED WITH INSTRUCTIONS TO GRANT THE WRIT OF HABEAS CORPUS.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PARIS HOYT CARRIGER,
Petitioner-Appellant,

v.

TERRY L. STEWART, Director of the Arizona Department of Corrections,
Respondent-Appellee.

No. 95-99025
D.C. No. CV-95-01617-PGR
OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
March 27, 1997—San Francisco, California

Filed: December 17, 1997

Before: Procter Hug, Jr., Chief Judge, James R. Browning, Mary M. Schroeder, Jerome Farris, Harry Pregerson, Stephen Reinhardt, Alex Kozinski, Ferdinand F. Fernandez, Thomas G. Nelson, Andrew J. Kleinfeld, and Sidney R. Thomas, Circuit Judges.

Volume 1
Opinion by Judge Schroeder;

Volume 2
Dissent by Judge Kozinski

KOZINSKI, Circuit Judge, with whom Judges Farris, Fernandez, T.G. Nelson and Kleinfeld join, dissenting.

What makes this a tough case is that Robert Dunbar, the prosecution's key witness, turns out to have been a big liar. Had the jurors seen Dunbar as we now see him, they would not have believed a thing he said. It is therefore surprising that my colleagues in the majority are able to say with confidence that one of Dunbar's many stories accurately describes what happened the day Robert Shaw was killed. And yet, it is this finding—that Dunbar told the truth when he said that he and his wife killed Shaw—which unlocks the *Schlup* gateway through which Carriger must pass before we can consider his abusive *Brady* claim.

Dunbar's fairy tale is not the stuff of which *Schlup* claims are made. The Supreme Court recognized in *Schlup* that "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995). To make out such a claim, a petitioner must come forward with *reliable* new evidence of his innocence. A repudiated recantation can never be reliable enough to satisfy *Schlup*. But even if it could under ideal circumstances, it cannot here because the majority's new evidence, even if believed, proves merely that Dunbar was guilty of Shaw's murder right along with Carriger. Only the innocent can profit from *Schlup*, and the new evidence here leaves Carriger at the murder scene with blood on his hands. Because the majority widens the *Schlup* gateway far beyond what the Supreme Court envisioned, I must respectfully dissent.

I

Schlup is a narrow exception to the rule that we will not consider abusive habeas claims; its limited purpose is to protect against "the execution of a person who is *entirely innocent*." 513 U.S. at 324-25 (emphasis added). As a matter

of necessity and design, we normally rely on a state's trial, appellate and collateral review processes to determine the truth in criminal prosecutions. Federal habeas provides another layer of protection, albeit limited. In capital cases, *Schlup* provides a further layer, more limited still. Only where a petitioner makes a compelling case based on reliable, credible, concrete proof that he is actually innocent may a federal court cast aside orderly procedure and consider an otherwise defaulted habeas claim.

Schlup started by recognizing that the vast majority of innocence claims are not credible: "[C]hallenges to the propriety of imposing a sentence of death are routinely asserted in capital cases . . . ." *Id.* at 324. Because unreliable evidence of innocence is easy to come by, the district court should quickly dismiss claims based on such evidence. *Id.* Truly credible claims are far less common: "[E]xperience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Id.* Only when a petitioner comes up with reliable, concrete, verifiable proof of actual innocence do we subordinate principles of finality and comity by considering a procedurally defaulted claim. *Id.*

Writing for the Court in *Schlup*, Justice Stevens explained that "[t]o be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." *Id.* at 324. Requiring that new evidence be reliable draws a workable line between the many cases involving frivolous claims of innocence and the few that raise potentially meritorious claims. *See Weeks* v. *Bowersox*, 119 F.3d 1342, 1351 (8th Cir. 1997) (en banc); *Bowman* v. *Gammon*, 85 F.3d 1339, 1346 (8th Cir. 1996). *Schlup* offered three examples of evidence that would pass the threshold of reliability: exculpatory scientific evidence, trustworthy eyewitness accounts and critical physical evidence. *Schlup*, 513 U.S. at 324. By enumerating the kinds of proof that could form the basis of a

substantial claim of innocence, the Supreme Court was telling us that less reliable kinds of evidence cannot support an actual innocence claim. The Court clearly did not hold that *Schlup* may be invoked whenever a witness changes his story.

Carriger's new evidence is not exculpatory scientific evidence, and it is not critical physical evidence. Is it a "trustworthy eyewitness account"? Certainly not. Recanting testimony has long been disfavored as the basis for a claim of innocence. Appellate courts, even on direct review, look upon recantations with extreme suspicion. *See United States* v. *Pointer*, 17 F.3d 1070, 1074 (7th Cir. 1994); *Olson* v. *United States*, 989 F.2d 229, 231 (7th Cir. 1993); *United States* v. *Nixon*, 881 F.2d 1305, 1311 (5th Cir. 1989); *United States* v. *Santiago*, 837 F.2d 1545, 1550 (11th Cir. 1988); *United States* v. *DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987); *United States* v. *Adi*, 759 F.2d 404, 408 (5th Cir. 1985).[1] Recanting testimony is easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial. A *repudiated* recantation like Dunbar's is even less worthy of serious consideration. One respected commentator advises that a motion for a new trial based on a repudiated recantation usually isn't worth the time it takes to prepare: "Although [a repudiation] does suggest that the witness is 'completely irresponsible,' the motion appears to have little or no chance of success. With the repudiation of the recantation, it becomes merely impeaching and could be used at a new trial only for the purpose of cross-examining the witness, and not as sub-

[1]Arizona courts share this suspicion:

> There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character.

State v. *Krum*, 903 P.2d 596, 602 (Ariz. 1995) (en banc), quoting *State* v. *Sims*, 409 P.2d 17, 22 (Ariz. 1965).

stantive evidence." Moore's Federal Practice § 633.05[2] (3d ed. 1997).

The majority tries to add force to Dunbar's recantation with the high drama of a death bed confession, the mea culpa of a guilt-ridden man clearing his conscience before going to meet his Maker.[2] *See* maj. op. at 14624. Quite moving, were it but true. Dunbar long outlived his confession: He recanted the confession shortly after he made it, but didn't die until four years later. Dunbar's recantation was nothing but a spiteful counterpunch to his estranged wife's accusation. In post-conviction proceedings nine years after the murder, the defense had called Joyce Stevens, Dunbar's ex-wife, who had provided Dunbar's "nap" alibi at trial. Joyce's new story was that Dunbar had confessed he was at the jewelry store with Carriger, and that Dunbar had actually struck the fatal blows with the skillet.[3] When Dunbar took the stand a few weeks later, he parried Joyce's story by testifying that *she* robbed the place with him and struck the first blows with the frying pan. Tit for tat.

The majority makes much of the fact that Dunbar confessed in "open court." *See* maj. op. at 14620 ("Dunbar actually confessed in open court"); *id.* at 14620 ("Dunbar confessed under oath in open court"). But Dunbar also testified at trial in open court, and then repudiated his confession in open court six weeks after he had made it. We thus know for sure that Dunbar lied in court at least once, probably many more times. *See*

[2]The law indeed accords dying declarations special treatment, at least where the statement concerns the cause of the declarant's impending death, based on the premise that one is not likely to lie so soon before Judgment. *See* Fed. R. Evid. 804(b)(2).

[3]Some of the details of Joyce's story are subject to doubt — among other things, she testified that Dunbar took a large frying pan along to rob the jewelry store. (Shaw's wife explained at trial that a small frying pan, identified as the murder weapon, was kept on a hot plate in the store.) Joyce was obviously embellishing to make Dunbar look guilty, thereby providing special motivation for Dunbar to do the same to her.

id. at 14655. The majority makes Dunbar out to be a congenital liar, *see id.* at 14653-57, then treats one of his statements as the Gospel Truth.

As in many cases, recanting testimony is all too common here: Joyce recanted her trial testimony, her children recanted theirs, Dunbar recanted his, and then he recanted his recantation. It's not easy to pluck the truth from this thistle of lies. The majority credits both Joyce's and Dunbar's recantations, but the two stories contradict each other on the key fact of whether Carriger was there. Far from corroborating Dunbar's confession, Joyce's testimony yanks the rug out from under the one fact that matters. To unlock the *Schlup* gateway for Carriger, we must find that Dunbar's recanted confession—not his testimony at trial, not his retraction, not Joyce's testimony at trial or her retraction—accurately describes what happened. A confession shrouded by so much doubt from a witness who is now dead is not reliable enough to satisfy *Schlup*. If what we have here is enough, the *Schlup* gateway becomes a freeway off death row. The doctrine of abuse of the writ, *see McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991), will be severely undermined.

II

The *Schlup* framework protects only those who are "entirely" innocent, not those who are guilty of homicide but ineligible for the death penalty. Under *Schlup*, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995). This compact phrase formulates a daunting standard: We must imagine twelve reasonable jurors hearing the original case against the petitioner, as augmented by the new evidence. For a petitioner to pass through the *Schlup* gateway, he must per-

suade us that every imaginary juror, twelve out of twelve, would vote to acquit him of any involvement in the killing.[4]

In a short paragraph buried in the bowels of its opinion, the majority dismisses the notion that "Carriger must prove that he is actually innocent." Maj. op. at 14648. According to the majority, under *Schlup* "the petitioner is required to present

---

[4]This standard, derived from *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986), is somewhat less strict than the standards discussed in *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993) and *Sawyer* v. *Whitley*, 505 U.S. 333, 336 (1992). Before the three-judge panel Carriger's lawyer abjured *Schlup* and pressed only a *Herrera* claim:

> Q Let me ask you about the actual innocence claim. Are you making both a *Herrera* and a *Schlup* claim?
>
> A No. We are making a *Herrera* claim. We filed a memorandum accompanying the petition for habeas corpus and it spells out: This is a *Herrera* claim.
>
> * * *
>
> Q . . . With respect to the specific question you were just asked by Judge Kozinski, on pages 15 and 16 of your brief you specifically mention *Schlup* v. *Delo* and I guess I'm not quite sure how that plays into the *Herrera* argument you were just making.
>
> A . . . That's there [because] that's what the District Court thought we were doing. It didn't look at the *Herrera* claim, it went and said, this isn't a claim, standing on its own, of actual innocence: this is a claim that was brought as a gateway under *Schlup* to resolve the issues of competence and *Brady*.

Oral Argument (telephone) 11/29/95 10:00 a.m. Relying on this representation, the panel focused its actual innocence analysis on *Herrera* rather than *Schlup*. *See* 95 F.3d 755, 757-61 (9th Cir. 1996). Carriger's lawyer resuscitated the *Schlup* claim at oral argument before the en banc court:

> Q You're talking about actual innocence. Are you talking about that in terms of both *Herrera* and *Schlup*, having *Schlup* act as a gateway?
>
> A That's exactly right.

Oral Argument 3/27/97 10:00 a.m.

'evidence of innocence' such that 'a court cannot have confidence in the outcome of the trial.' " *Id.* The majority cuts the heart out of *Schlup* by omitting its key requirement, namely that "a petitioner show that he is 'actually innocent.' " *Schlup*, 513 U.S. at 327. The showing of innocence under *Schlup/Carrier* is somewhat lower than that under *Herrera/Sawyer*,[5] but the need for a petitioner to prove his innocence is echoed repeatedly in *Schlup*: "*Carrier* requires a petitioner to show that he is 'actually innocent.' " *Schlup*, 513 U.S. at 327; *id.* at 326-27 ("[W]e hold that the *Carrier* "probably resulted" standard . . . must govern the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims."); *id.* at 327 ("The *Carrier* standard requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent."); *id.* at 327 ("The *Carrier* standard is intended to focus the inquiry on actual innocence."); *id.* at 329 ("[T]he *Carrier* standard requires a petitioner to show that it is more likely than not that 'no reasonable juror' would have convicted him.").[6]

---

[5]Under *Herrera*, the petitioner must make a "truly persuasive demonstration of 'actual innocence,' " while under *Schlup* it is sufficient to show that he is probably innocent. *Compare Herrera*, 506 U.S. at 417, *with Schlup*, 513 U.S. at 327.

[6]The source of the majority's confusion may lie in the manner in which the *Schlup* Court distinguished *Herrera*. Writing for the Court, Justice Stevens explained that when a petitioner makes a credible showing of innocence—such that a court cannot have confidence in the "result" or "outcome" of the trial—the gateway must open and the case must be considered on the merits. *Schlup*, 513 U.S. at 316-17. The majority confuses confidence in the fairness of the proceedings with confidence in the result or outcome. Confidence in the outcome of a trial is undermined only if we are persuaded that the petitioner is innocent—even if the original jury verdict was tainted by constitutional error. This sounds remarkable at first blush, but it really isn't. To avoid swallowing up the doctrine of abuse of the writ, the miscarriage of justice inquiry set forth in *Schlup* emphasizes actual innocence—the *outcome* of the trial—rather than the *fairness* of the trial. Only if we are persuaded that the petitioner is actually innocent can we proceed through the gateway and then consider whether the petitioner received a fair trial.

The majority's disregard of *Schlup* shows up in another stealth reference, this time in the bottom half of a footnote: "We do not agree with the assumption that . . . our test under *Schlup* is to decide how a hypothetical jury would regard each bit of new evidence. Our task is to determine whether confidence in the actual verdict is undermined." Maj. op. at 14639 n.4. Are we all reading the same Supreme Court opinion? In my version, the Court holds that "a petitioner does not meet the threshold requirement unless he persuades the district court that, *in light of the new evidence*, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329 (emphasis added).[7] The Supreme Court expects us to consider the state of the evidence now—adding both the exculpatory and the inculpatory proof that has come to light since the verdict—and determine whether a properly instructed jury would find the defendant innocent. Predicting what reasonable jurors would do is not easy.[8] It's much harder than combing the record and picking at the state's case. But it's what *Schlup* demands.

---

[7]The majority seems to adopt the *Strickland* prejudice standard rather than *Schlup/Carrier* for Ninth Circuit actual innocence claims. *Compare* maj. op. at 14639 n.4 ("Our task is to determine whether confidence in the actual verdict is undermined.") *with Strickland* v. *Washington*, 466 U.S. 668, 695 (1984) (holding that prejudice requires "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.") Undermining confidence in the verdict—in the sense that new evidence or flaws in the trial might have led one of the jurors to vote differently—isn't enough to open the gateway. The *Schlup* standard is higher, and requires the petitioner to prove that he is actually innocent. *See Schlup*, 513 U.S. at 327 ("The petitioner thus is required to make a stronger showing than that needed to establish prejudice."); *id.* at 332-33 (O'Connor, J., concurring) (fifth vote) ("This standard is higher than that required for prejudice[.]").

[8]Indeed, this was a source of friction between the majority and dissent in *Schlup*. Justice Stevens defended the standard as manageable: "Finders of fact are often called upon to make predictions about the likely actions of hypothetical 'reasonable' actors. Thus, the application of 'more likely than not' to the habeas court's assessment of the actions of reasonable jurors is neither illogical nor unusual." *Schlup*, 513 U.S. at 329 n.48.

III

Carriger has failed to prove that, "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. Even if Dunbar's repudiated confession were the type of evidence that could trigger a *Schlup* inquiry, we would then have to determine whether Carriger is entirely innocent of Shaw's killing. Proof that others are also guilty, or that Carriger's role was less central than the original jury may have believed, is not enough. To pass through the *Schlup* gateway, Carriger must do more than raise doubt in the mind of some imaginary juror. He must identify new evidence which so undermines the state's case that each and every reasonable juror would vote to acquit.

Measured against this standard, there is precious little here that helps Carriger. Let's start with Dunbar's confession, which the majority seems so taken with. Because Shaw was killed in the course of a robbery, Carriger would be guilty of felony murder even if he did not kill Shaw himself. *See State v. Vargas*, 618 P.2d 229, 230 (Ariz. 1980) (en banc). The most likely way for Carriger to prove his innocence would be to show that he had no involvement in the crime whatsoever —that he was somewhere else, minding his own business. Dunbar's confession helps Carriger only if we think that all twelve imaginary jurors would swallow the preposterous tale that Dunbar and Joyce robbed and killed Robert Shaw together. Yet the record lacks even a sliver of support for this fantasy: There is no physical evidence of her involvement and she has an alibi. Absolutely no one—Carriger himself included—takes this part of Dunbar's confession seriously.[9]

[9]Dunbar implicated his wife throughout the "confession." Dunbar claimed that after they arrived at the store, Shaw was still there, so Dunbar bound him up, went over to the cabinets and started taking out pieces of jewelry. Dunbar then presented a vivid picture of the murder:

Joyce's participation is not a side show—a trivial detail that can be shrugged off. So far as Carriger is concerned, this is the meat of the coconut. Let's say Dunbar was there, that he participated in the robbery, that he wielded the lethal frying pan. *See* maj. op. at 14641. None of this proves Carriger *wasn't* there. The only part of Dunbar's confession that exonerates Carriger is where he claims it was Joyce (not Carriger) who was his accomplice. And for that part we have only Dunbar's unadorned words—the fabrication of a proven liar.

But it's even worse than that for Carriger. Under *Schlup* we cannot look just at Dunbar's confession; we must consider *all* post-trial evidence, including Joyce's testimony and that of her children.[10] According to Joyce, Dunbar and Carriger were in cahoots when they committed the robbery and murder. Joyce had reason to falsely accuse Dunbar, but no motive whatever to falsely accuse Carriger. Larry White, Joyce's eldest son, reported that when Dunbar let "bits and pieces" of

---

> I started taking things from the cabinets and I heard a muffled kind of thud or gong and I also heard some kind of screams or moans. And I ran back to the back and I saw lots of blood around Mr. Shaw and his head, and Joyce was standing there saying over and over, "I can't get caught, I can't get caught, I got kids."

R.T. 10-30-87 at 13. Dunbar then admitted that he, too, hit Shaw with the frying pan and strangled him, but only after Joyce had struck the first blows. *Id.*

In the context of Joyce's testimony and the other evidence that Carriger and Dunbar committed the crime together, Dunbar's confession can be convincingly read as the very real recollection of the crime if Carriger is substituted for Joyce as striking the first blows with the skillet.

[10]Carriger also identifies hearsay evidence of Dunbar boasting to friends about how he set Carriger up. *See* maj. op. at 14634. It's not clear if any of this is reliable enough to form the basis of a *Schlup* claim, but it doesn't matter because it all suffers from the same fatal flaw as Dunbar's confession: It fails to show that Carriger is actually innocent of murder, and it too suggests only that Dunbar committed the murder with Carriger and set Carriger up after the fact to take the fall by himself.

the story slip out over the years, he included Carriger (not Joyce) as the accomplice. Asked directly about Carriger's involvement, Larry confirmed that "I picked up from Bob [Dunbar] that [Carriger] was involved with the whole thing." R.T. 7-14-87 at 58. Patience Stevens, the youngest daughter, once overheard Dunbar laughing about the murder: "Bob was laughing, and then he said that—that the guy was begging for Paris [Carriger] not to kill him and telling him that he had family and that, and that he loved them." R.T. 7-14-87 at 130. Stephanie Stevens, another daughter, confirmed that Joyce was at home in the living room—not out with Dunbar robbing the jewelry store—the afternoon of the murder. It's hard to imagine anyone—let alone twelve out of twelve reasonable jurors—who would hear the new testimony of Joyce and her children and still swallow Dunbar's confession."

Short of proving that Carriger was not involved in the crime, Dunbar's vacillation might help Carriger in a subtler way by impeaching a central witness for the prosecution. So let's assume that our imaginary jury would think Dunbar was a liar and disregard his testimony altogether. This wouldn't help Carriger because the state's circumstantial case is reasonably strong and stands independent of Dunbar's trial testimony. Even looking at the case anew, with a stigma of doubt attached to everything that came out of Dunbar's mouth, reasonable jurors considering the remaining proof could and would still find plenty on which to convict Carriger of felony murder. Carriger knew Dunbar from prison and knew his reputation as an accomplished burglar. Just two days before Shaw's murder, Dunbar and Carriger made a failed burglary attempt. Carriger moved onto Dunbar's property the day before the murder. The day of the murder, Carriger called in

"It's even harder for me to imagine how the majority can review this record and still say that "[t]here is no evidence that Dunbar and Carriger acted together to commit the murder." Maj. op. at 14634 n.1. Is the testimony of Joyce and her children "no evidence"? This testimony alone is enough to discredit Dunbar's confession and seal Carriger's fate.

sick and spent the day with Dunbar. The two of them visited jewelry stores, pawn shops and electronics stores; they also stopped to buy a gun. They walked into Shaw's jewelry store, where Dunbar commented that it would be an easy place to hit. These certainly appear to be the actions of two veterans planning a robbery.

There is more. Carriger's fingerprint was found on the tape used to bind Shaw's wrists. Forensic post-trial evidence shows that the print could only have gotten onto the tape at the murder scene. *See* pp. 14675-78 *infra*. We also have the droplets of blood found on Carriger's boots. It's true that they were too small to test, and that they might have come from a source other than Robert Shaw. But it's not a big leap to conclude that Carriger's boots were splattered with blood at the jewelry store and that Carriger's feet were in them at the time.

And more still. Carriger has no alibi. Nor did he adequately explain his incriminating actions after the robbery. That evening, after Dunbar supposedly surprised him with the news that he had robbed a jewelry store while wearing Carriger's boots, Carriger made no effort to distance himself from Dunbar. Instead, he took the two cases—the gun case and the attache case containing the jewelry—and delivered them to Dunbar's stepdaughter. Carriger still had the key to the attache case when he was arrested.

A jury confronted with all the evidence at trial, plus Dunbar's fleeting confession, plus the post-trial testimony of Joyce and her children, plus the forensic evidence putting Carriger at the scene, would not believe every syllable of Dunbar's confession to the exclusion of everything else, as the majority does here.[12] Far more likely, a rational jury would

[12]Dunbar's explanations during this confession are the road map the majority uses to explain away all physical evidence of Carriger's involvement. *See* maj. op. at 14638 ("Dunbar explained that he had taken the

regard all of Dunbar's testimony as unworthy of belief. But it probably would accept the explanation of Joyce and her children that Dunbar (who was living with them at the time) pressured them into providing him with an alibi at Carriger's trial, and credit Joyce's account that Dunbar and Carriger committed the crime together. Dunbar's statements about his participation in the crime—about having bashed in a man's skull—would serve to implicate Dunbar, but would also count heavily against Carriger as his accomplice. Joyce's post-trial statement would also tie up other loose ends in the record, such as how Dunbar's fingerprints got on the jewelry. All told, the case against Carriger—even with Dunbar's testimony completely omitted—is stronger now than it was at trial. It is inconceivable that twelve rational jurors hearing the case today would unanimously find Carriger innocent of any and all involvement in Shaw's murder.

IV

The majority makes another egregious error when it discards the state court's finding that Dunbar's confession was not credible. The majority's methodology will seriously

---

adhesive tape . . ."); *id.* at 14639 ("Dunbar testified that he gave Carriger the attache case to give to Jackie White to hold;"); *id.* at 14639 ("Dunbar testified in his confession that the clothes he led the police to were the clothes he, Dunbar, had worn during the robbery"); *id.* at 14639 ("[W]hen he confessed, Dunbar stated he planted Carriger's jeans in the canal"); *id.* at 14640 ("In his confession, Dunbar testified that he discarded the clothes . . ."); *id.* at 14648 ("Dunbar, without immunity, confessed under oath to committing the murder"); *id.* at 14649 ("Dunbar's confession explained why Carriger's fingerprint was on the tape, although Carriger was not there").

One would hardly believe it's the selfsame Dunbar the majority describes as a "known habitual liar," *id.* at 14620, a "habitual liar," *id.* at 14622, a "less than reliable" informant, *id.* at 14630, "well known . . . to be a liar," *id.* at 14631, "manipulative" and "sociopathic," *id.* at 14632, 14654, "lying," *id.* at 14641, "vague and evasive," *id.* at 14642, and saddled by a "long history of lying to police," *id.* at 14650, 14655.

undermine the degree of deference federal courts in this circuit give to state court findings of fact in habeas proceedings. The state court here, it will be recalled, found that Dunbar told the truth when he testified at trial and again when he recanted his confession. The majority comes to the opposite conclusion, finding Dunbar's confession credible. In so doing, it sets aside state court findings of fact which come to us with a presumption of correctness; these findings must be given at least as much deference as findings by our district courts, perhaps a bit more. Indeed, it "would pervert the concept of federalism to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings." *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991) (citation and internal quotation marks omitted). The majority ignores this guidance and treats the state court's findings of fact with the skepticism usually reserved for findings of Administrative Law Judges and Immigration Judges. *See, e.g., Washington* v. *Garrett*, 10 F.3d 1421, 1430-31 (9th Cir. 1993) (reversing ALJ); *Aguilera-Cota* v. *INS*, 914 F.2d 1375, 1381-82 (9th Cir. 1990) (reversing IJ); *Turcios* v. *INS*, 821 F.2d 1396, 1400 (9th Cir. 1987) (reversing IJ).

The majority first casts aspersions on the credibility findings of Judge Ryan (who handled the state post-conviction proceedings) by noting that he did not also preside at Carriger's murder trial. *See* maj. op. at 14637-38. But appellate court deference is based on the institutional competence of the factfinder, not merely his observation of the witnesses. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574-75 (1985). The added concerns of finality and federalism make an even stronger case for deference on collateral review. Nor can the majority take cover in the statutory phrase "as a whole": "We greatly doubt that Congress, when it used the language 'fairly supported by the record' considered 'as a whole' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." *Marshall* v. *Lonberger*, 459 U.S. 422, 434-35 (1983).

In any event, Judge Ryan had plenty of opportunity to observe Dunbar, Joyce, Joyce's children and other witnesses. Most significantly, of course, he saw Dunbar's courtroom confession, and six weeks later he saw the recantation. Judge Ryan was therefore practically, not merely institutionally, in a better position to figure out when Dunbar was lying. "Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall*, 459 U.S. at 434.

The majority nitpicks its way through the record and concludes that "each piece of evidence is as consistent with Dunbar's confession as it is with his trial testimony." Maj. op. at 14638. *See also id.* at 14634 n.1 ("[T]he inference that Dunbar acted alone is at least equally plausible."); *id.* at 14639 ("Nothing establishes that the clothes had been worn by Carriger, rather than Dunbar.") *id.* at 14640 ("The boots are no more consistent with Carriger's guilt than with Dunbar's."); *id.* at 14648 ("other evidence . . . points as directly to Dunbar as to Carriger").[13] But if the evidence supports Dunbar's trial

[13]The majority draws each inference in favor of Carriger. It begins by discarding the physical evidence, finding that: Carriger could not have left only one fingerprint on the tape while binding Shaw's hands, maj. op. at 14638; Carriger's having the key to the attache case meant nothing, *id.* at 14639; Dunbar wore Carriger's clothes during the robbery, *id.* at 14639; Dunbar planted Carriger's jeans in the canal, *id.* at 14640; Carriger's fingerprints on the gun case meant nothing, *id.* at 14640; Dunbar wore Carriger's boots, *id.* at 14640; and Carriger would have left recoverable fingerprints on the jewelry had he not worn gloves, *id.* at 14640. The majority then moves on to even more speculative matters, finding that: Dunbar could not have known the details of the crime unless he participated, *id.* at 14641; Dunbar was not shown diagrams of the store; *id.* at 14641; Dunbar's lawyer was not interested in publicity, *id.* at 14641; Dunbar was vague and evasive when recanting his confession, *id.* at 14641-42. None of these findings had been made before in the twenty-year history of this case, and each is used to support the majority's most speculative (and contradictory) findings of all: that Dunbar was telling the truth when he confessed, *id.* at 14642, and that he acted alone, *id.* at 14634 n.1. The role of the factfinders in our criminal and habeas systems demands more respect than this.

testimony just as well as his confession, how can we reject the state court's finding that Dunbar told the truth at trial? "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. If the majority is holding, as it seems to, that state court findings of fact will only be upheld where the record supports no other scenario, it has stepped directly in the path of a long train of contrary authority. *See, e.g., Purkett* v. *Elem*, 514 U.S. 765, 769 (1995); *Parke* v. *Raley*, 506 U.S. 20, 35-36 (1992); *Burden* v. *Zant*, 498 U.S. 433, 436-37 (1991); *Demosthenes* v. *Baal*, 495 U.S. 731, 736-37 (1990); *Wainwright* v. *Witt*, 469 U.S. 412, 434 (1985); *Maggio* v. *Fulford*, 462 U.S. 111, 118 (1983).

Worse still is the majority's hopelessly one-sided review of the record. The majority does not look to see whether there is support for the state court's presumptively correct findings; rather, it chooses only those facts and inferences that undermine those findings. Take the single most damning piece of proof against Carriger: his fingerprint on the adhesive tape used to tie up Shaw's wrists. If Carriger's print got on the tape before the murder, it could only have been on the outside of the reel, which would place it on the first few inches used to tie Shaw's wrists. Nine feet of tape were used to tie up Shaw, and most of it was found balled up in a large wad. The only way any preexisting prints could have survived on the tape is if the first six or so inches used to tie up Shaw had been left uncovered and unsmudged when eight and one-half more feet were wrapped around his wrists and wadded up into a ball. Anyone who has used tape will know this is highly unlikely. The usual way of applying tape is to stick the end piece to the object being bound—be it a duct, a package or a human wrist —and then bring the reel around the object and stick the second layer of tape on top of the first. It would be remarkable to use nine feet of tape to tie up a person's wrists yet leave the first six inches exposed. I have trouble imagining how this might be done.

The jury heard the defense's theory about the print at trial and, not surprisingly, rejected it. The state has since confirmed this common sense conclusion with expert testimony. A criminalist at the post-conviction proceedings explained that, after cutting the wad of tape into seven pieces so he could unravel it, he fit the pieces together end to end to see where Carriger's print was located. It was twenty-one and one-half inches from the end of the tape—not on the first few inches. This destroys Carriger's theory and provides strong proof that he was present and participated in the murder.

The majority agrees that the criminalist's evidence must be considered, but finds it unreliable and accords it "little weight." Maj. op. at 14639. The majority points to a perceived inconsistency in the expert's testimony because the criminalist was unable to tell which end of the tape matched the end of the roll. It is difficult to understand why the majority sees this as inconsistent—either way the fingerprint is not near the end. More remarkable is how quickly my colleagues are willing to dismiss solid evidence that points directly to Carriger's guilt while blowing out of all proportion scraps of evidence, like hearsay statements in Dunbar's prison file, that might conceivably point the other way. This is not the sober, dispassionate review of the evidence *Schlup* calls for; it is a scavenger hunt for anything that might cast doubt on the jury's verdict.

The fingerprint evidence is exactly the kind of proof that *should* be given the greatest weight in making the *Schlup* inquiry, as the expert witness testified under oath, and Carriger's lawyer both interviewed him and cross-examined him extensively. And the expert was unequivocal in locating Carriger's print on the tape:

> Q All right. Can you tell us how long the length of tape is approximately?
>
> A Approximately eight feet, nine inches.

Q How many segments are there in that length of tape?

A Twelve.

Q Where is the segment in Exhibit 43, the latent lift segment of tape—where does that occur from the end of the metal roll of tape contained in the plastic bag in Exhibit 41?

A Approximately 21 and a half inches, ma'am.

Q To what degree of certainty are you certain of this result? Did I ask a bad question? Is there any degree of certainty that you can state that you are confident in your conclusion that you have reassembled the entire roll?

A I am certain that I have reassembled the segment of tape that was torn to make the wad, and I am certain that the latent fingerprint lift segment is in its appropriate place in relation to the length of tape and to the piece of tape on the ends of the roll of tape.

MS. FUNKHOUSER: Your Honor, at this time I would move to admit exhibits No. 41, 42, 43 and 54 for purposes of the offer of proof and I have no additional questions for this witness at this time.

THE COURT: Okay. Those exhibits are admitted for the limited purposes of the offer of proof.

R.T. 12-11-87 at 56-57.

The evidence was not excluded for unreliability, as the majority suggests. Rather, it was excluded because Carriger, at the last minute, withdrew his challenge to the fingerprint

evidence. Judge Ryan therefore ruled that the testimony from the criminalist was no longer relevant:

> The reason I am sustaining the defense's objection to calling these witnesses to present evidence is because since the defense has abandoned their challenge to the fingerprint testimony, that I don't think its relevant for you to present evidence, but you want to make an offer of proof to show what the evidence would be if the Court were to allow that.

R.T. 12-11-87 at 6. Following Judge Ryan's suggestion, the state presented the testimony as an offer of proof, just in case Carriger decided to challenge the fingerprint evidence later on. Carriger has now done so and the testimony of the criminalist must be accorded due weight.

The majority also relies on the fact that only one fingerprint was found on the tape: "Had Carriger left the print while binding the victim, as the state contends, it is difficult to understand how he could have left only one print." Maj. op. at 14638. This is silly. We are not talking here about nine feet of tape laid out flat like an FBI fingerprint card.[14] Most of the tape was stuck to itself and rolled up in a big wad, hardly the ideal medium for latent fingerprints: "The development of fingerprints on adhesive tape has always been a challenge for latent fingerprint examiners." Advances in Fingerprint Technology 88 (Henry C. Lee & R.E. Gaensslen eds., 1994). How many recoverable prints do my colleagues expect to find on such an inhospitable surface? I find it surprising that even a

[14]Even those little cards aren't foolproof. Working under ideal conditions—a willing subject, a flat card clasped firmly into place, fingers drenched in printer's ink—it often takes experts several tries to produce a usable set of prints. Under less ideal conditions, obtaining a usable print is very chancy. It depends on several factors: The kind of surface on which the print might be left, how oily or dry the individual's skin is, and whether anything has smudged the print. *See* Advances in Fingerprint Technology 60-63 (Henry C. Lee & R.E. Gaensslen eds., 1994).

single readable print was retrieved from a wad of adhesive tape cut from the body of a murder victim.

In the end, it matters not whether my view of the evidence or that of the majority prevails. Let's say the majority's view is plausible. The contrary view—held by the jury, Judge Ryan, the Arizona Supreme Court, and the district court—surely is plausible as well. What I find alarming is the majority's methodology, which is to take one view of the evidence, and one view only, ignoring the proof and reasonable inferences pointing the other way. Section 2254(d) demands far greater deference to state court judges. And not just in degree, but in basic approach: Reviewing the record "as a whole" isn't a license to draw every single inference in favor of the petitioner.

We've been reversed for this kind of thing before. In *Sumner* v. *Mata*, the Supreme Court admonished us that the presumption of correctness could not be cast aside through pro forma acknowledgment of section 2254:

> Obviously, if the [Ninth Circuit] Court of Appeals . . . or any other court of appeals had simply inserted a boilerplate paragraph in its opinion that it had considered the state record as a whole and concluded that the state appellate court's factual determinations were not fairly supported by the record, this objection to the judgment of the Court of Appeals could not as easily be made. Just as obviously, this would be a frustration of the intent of Congress in enacting § 2254(d).

Sumner v. *Mata*, 449 U.S. 539, 549 (1981). Each underlying fact is entitled to a presumption of correctness unless an exception to 2254(d) applies; federal courts reviewing state findings on habeas must face up to any disagreement as to each one of these facts. *Compare Mata* v. *Sumner*, 696 F.2d 1244 (9th Cir. 1983), *Mata* v. *Sumner*, 649 F.2d 713 (9th Cir.

1981) *and Mata* v. *Sumner*, 611 F.2d 754 (9th Cir. 1979) *with Sumner* v. *Mata*, 455 U.S. 591 (1982) *and Sumner* v. *Mata*, 449 U.S. 539 (1981). The majority's willingness to nimbly pick its way through the evidence and come up with its own appellate factfinding bodes ill for the doctrine of deference to state court findings. The presumption of correctness is left in tatters.

V

On the other side of the *Schlup* gateway, the majority discovers a *Brady* violation. But my colleagues gloss over a key fact: Before trial Carriger himself wrote his lawyer, Thurman Gay, alerting him to Dunbar's history as an informant and directing him to get Dunbar's prison record. Carriger's letter states in relevant part:

> Point #3
>
> Bobby Dunbar was the informant for the state against John Douglas Troutman for a safe burglary of the National Cash Register Company (about 1968 I think)
>
> . . .
>
> Point #4
>
> Perhaps *while we are getting Dunbar's prison record* we should also get a copy of mine.

Attachment to District Court Record on Appeal at 126 (April 18, 1978 letter to Thurman Gay) (emphasis added).

Brady does not require the prosecutor to direct a counter-investigation to destroy its own case. *See United States* v. *McVeigh*, 954 F. Supp. 1441, 1449 (D. Colo. 1997). Accordingly, a defendant who has specific knowledge of the evi-

dence "withheld" but fails to request it cannot claim a *Brady* violation. The government need not give notice sua sponte where the accused has knowledge of the documents in question. *See Routly* v. *Singletary*, 33 F.3d 1279, 1285 (11th Cir. 1994); *United States* v. *Iverson*, 648 F.2d 737, 738-39 (D.C. Cir. 1981); *Ross* v. *Heyne*, 638 F.2d 979, 986 (7th Cir. 1980); *United States* v. *Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980); *United States* v. *Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977); *Hampton* v. *United States*, 504 F.2d 600, 603 (10th Cir. 1974); *Wallace* v. *Hocker*, 441 F.2d 219, 220 (9th Cir. 1971). The prosecutor in this case breached no duty.

Dunbar's prison file would have provided further proof that Dunbar was a snitch, a thief and a liar. Carriger alerted Gay to the existence of the file. Gay apparently decided that he had enough to impeach Dunbar. Not a wise choice, perhaps, but neither is it one for which the prosecutor must shoulder the blame under *Brady*. A prosecutor has no duty to investigate and turn over impeachment evidence the defense already knows about. Carriger's *Brady* claim fails.

VI

This is a difficult case. The state relied heavily on the testimony of an unreliable informant. Still, its case at trial was sufficient and nothing that has come to light since the verdict ushers Carriger through the actual innocence gateway. When navigating the murky waters of "fundamental miscarriage of justice," we ought to stick close to the rules handed down by the Supreme Court and accept the guidance provided. Because I disagree with the majority's reading and application of *Schlup*, I dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PARIS HOYT CARRIGER,	)	No. CIV-95-1617-PHX-PGR
	)	
Petitioner,	)	MEMORANDUM OF
	)	DECISION AND ORDER
vs.	)	
	)	
SAMUEL LEWIS, et al.,	)	
	)	
Respondents,	)	
	)	

Petitioner, Paris Hoyt Carriger, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. He alleges that the State of Arizona convicted him of murder and sentenced him to death in violation of his constitutional rights. Petitioner filed a previous petition for writ of habeas corpus challenging the same conviction and sentence. See Carriger v. Lewis, CIV 85-1608-PHX-CAM. That petition was denied. See Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992), cert. denied, 113 S. Ct. 1600 (1993).

FACTUAL BACKGROUND

On March 13, 1978, Robert Shaw's jewelry store was robbed. The robber tied Mr. Shaw' hands behind his back and repeatedly struck him on the head with an iron skillet, and then strangled him with his own necktie. The robber took jewelry from the store.

Two days later, Petitioner was indicted for the robbery and first-degree murder of Mr. Shaw. At trial, Robert Dunbar ("Dunbar") was the state's key witness who testified against Petitioner.

PROCEDURAL HISTORY

Petitioner was convicted of first-degree murder and robbery on July 28, 1978, and sentenced to death on October 27, 1978. The Arizona Supreme Court affirmed the conviction and sentence. State v. Carriger, 123 Ariz. 335, 599 P.2d 788 (1979), cert. denied, 444 U.S. 1045 (1980).

On September 29, 1981, Petitioner filed a petition for post-conviction relief in state court. The petition was denied on January 29, 1982. On

appeal, the Arizona Supreme Court held that Petitioner was entitled to a new sentencing hearing because his counsel had rendered inadequate assistance at sentencing. State v. Carriger, 132 Ariz. 301, 645 P.2d 816 (1982). The Arizona Supreme Court also remanded for consideration of all other claims properly raised in the petition for post-conviction relief. Id. On remand, on October 27, 1982, Petitioner was again sentenced to death. The Arizona Supreme Court affirmed the death sentence and rejected the post-conviction claims on December 6, 1984. State v. Carriger, 143 Ariz. 142, 692 P.2d 991 (1984), cert. denied, 471 U.S. 1111 (1985).

On July 5, 1985, Petitioner filed a petition for writ of habeas corpus in this Court. Carriger v. Lewis, CIV 85-1608-PHX-CAM. The petition was dismissed by order dated June 5, 1986. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit.

In the meantime, Petitioner filed a second petition for post-conviction relief in state court based on alleged newly available evidence. After a six-day evidentiary hearing, relief was denied on February 22, 1988. The Arizona Supreme Court denied the petition for review on October 25, 1988.

On May 27, 1990, while the appeal in the Ninth Circuit was still pending, Petitioner filed a Rule 60(b) motion in this Court requesting a new trial or reconsideration of the order denying federal habeas corpus relief, based on the alleged newly available evidence. The motion was denied by orders dated June 8, 1990, and July 25, 1990.[1]

On November 4, 1991, a panel of the Ninth Circuit affirmed this Court's denial of habeas corpus relief. Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992), cert denied, 113 S. Ct. 1600 (1993).

On February 14, 1994, Petitioner filed a third petition for post-conviction relief in state court. It was denied without an evidentiary hearing on April 11, 1994. The Arizona Supreme Court denied the petition for review on July 13, 1995.

---

1. The Ninth Circuit subsequently vacated these orders after determining that this Court did not have jurisdiction to entertain the Rule 60(b) motion. Carriger v. Lewis, 971 F.2d 329 332 (9th Cir. 1992). Prior to the filing of the motion, the Ninth Circuit outlined for petitioner the procedure he needed to follow to vest this Court with jurisdiction, but he declined to follow it. Id.

On August 8, 1995, Petitioner filed the present Petition for Writ of Habeas Corpus in this Court. Respondents filed an Answer and Petitioner filed a Traverse.

DISCUSSION

Applicable Law

Pursuant to the United States Supreme Court's holding in Sawyer v. Whitley, unless a habeas petitioner shows cause and prejudice, a federal district court cannot reach the merits of:

> (a) successive claims which raise grounds identical to grounds heard and decided on the mentis in a previous petition, Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 354 (1986); (b) new claims, not previously raised which constitute an abuse of the writ, McCleskey v. Zant, 499 U.S. [465], 111 S. Ct. 1454, 113 L. Ed.2d 517 (1991); or (c) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims. Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)

Sawyer v. Whitley, 505 U.S. ___, 112 S. Ct. 2514, 2518 (1992) (emphasis in original); see also Clark v. Lewis, 1 F.3d 814, 819 (9th Cir. 1993); 28 U.S.C. §§ 2244(b), Rule 9 of Rules Governing Sections 2254 Cases (1988).

In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 2645 (1986). Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. Id.

In an abuse-of-writ inquiry, the respondents have the burden of pleading abuse of the writ by setting forth with clarity and particularity the petitioner's prior writ history, identifying the claims that are new, and alleging that the petitioner has abused the writ. McCleskey v. Zant, 499 U.S. 467, 494, 111 S. Ct. 1454, 1470 (1991). The burden of proof then shifts to the petitioner to show cause and prejudice, or that a fundamental miscarriage of justice would result if the claim is not heard. Id. The cause standard to be met is the same as that for procedural default. Id.

For a successive claim. a petitioner must show "cause for seeking review of the same claim twice--such as the discovery of new facts, or an intervening change in the law, that warrants reexamination of the same

ground for relief raised in an earlier petitioner." Campbell v. Blodgett, 997 F.2d 512, 524 (9th Cir. 1993).

"Prejudice" is actual harm from the alleged constitutional errors. McCleskey, 499 U.S. at 494, 111 S. Ct. at 1470. An evidentiary hearing is not necessary to allow a petitioner to show cause and prejudice if the court determines as a matter of law that the petitioner cannot satisfy the standard. Id.; see also Clark, 1 F.3d at 820.

If a Petitioner cannot meet the cause and prejudice standard, the court still may hear the merits of abusive, successive, or procedurally barred claims if the failure to hear the claims would constitute a "fundamental miscarriage of justice." Sawyer, 122 S. Ct. at 2518; McCleskey, 499 U.S. at 494–95, 111 S.Ct. at 1470. The "fundamental miscarriage of justice" exception is also known as the "actual innocence" exception. There are two types of claims recognized under this exception: 1) that a petitioner is "innocent of the death sentence," or, in other words, that the death sentence was erroneously imposed; and 2) that a petitioner is actually innocent of the capital crime. In the first instance, the petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the existence of an aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Sawyer, 112 S.Ct. at 2517, 2522. Claims regarding errors in the submission of mitigation evidence do not relate to a "condition of eligibility" and cannot form a basis for relief under this exception. Id. at 2523.

Claims of actual innocence of the crime itself are judged under a different standard. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, ___ U.S. ___, 115 S.Ct. 851, 867 (1995). To establish the requisite probability, the petitioner must show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. at 867. A district court must consider the probative force of all relevant evidence on a reasonable juror, including evidence alleged to have been illegally admitted and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial. Id. The court also may have to determine how the timing of the submission of evidence and credibility of affiants bear on the probable reliability of that evidence. Id. at 868–69.[2]

---

2. Substantive (or "free-standing") claims of actual innocence must be distinguished from procedural claims. See Schlup, 115 S. Ct. at 860.

Claims Raised in First Federal Habeas Corpus Petition

On July 5, 1985, Petitioner filed his first federal habeas corpus petition. (85 File doc. 1)[3] He raised the following claims:

A. The trial court limited Petitioner's counsel's cross-examination of Dunbar, the state's key witness, in violation of Petitioner's right to compulsory process and due process under the Sixth and Fourteenth Amendments.

B. Petitioner was denied effective assistance of counsel at and before trial in violation of the Sixth and Fourteenth Amendments, including counsel's failure to conduct an investigation into Dunbar's veracity.

C. Petitioner's due process rights were violated because the jury was not permitted to consider a verdict of guilty on a lesser included non-capital offense of second-degree murder.

In Herrera v. Collins, 506 U.S. ___, 113 S. Ct. 953 (1993), the petitioner advanced his claim of innocence to support a novel substantive constitutional claim that the execution of an innocent person would violate the Eighth Amendment even if the proceedings that had resulted in his conviction and sentence were entirely fair and error-free. In that case an extraordinarily high standard of review was applied. In contrast, in Schlup the petitioner accompanied his innocence claim with an assertion of constitutional errors at trial (ineffectiveness of counsel and withholding of evidence.) In such a case, if a petitioner"presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." Schlup, 115 S. Ct. at 861.

3. "85 File doc. __" refers to documents in the Court's file opened in 1985 upon the filing of the first petition. "95 File doc. __" refers to documents in the Court's file opened in 1995 upon the filing of the second petition. "Resp. Attach. ___" refers to the Attachments to the Answer in the 1989 file. "Pet. Ex. ___" refers to exhibits to the petition filed August 8, 1995. "R.O.A. ___" refers to documents in the file of the Arizona Superior Court. A copy of that record is provided as exhibits to the answer to the 1995 petition. "R.T." refers to reporter's transcripts.

D. The issue of whether the murder was accomplished for pecuniary gain was reconsidered in Petitioner's subsequent 1982 resentencing in violation of the Double Jeopardy Clause.

E. Arizona's capital sentencing scheme violates the Eighth and Fourteenth Amendments because it would be ten times more likely for the murderer of a white victim to be on death row than it would be for the murderer of a non-white victim.

F. Petitioner was denied his Sixth Amendment right to have the existence of an aggravating circumstance decided by a jury.

G. Arizona's capital sentencing scheme violated Petitioner's due process rights because it did not require the trial court to find that aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt, or that mitigating evidence was not sufficiently substantial to call for leniency beyond a reasonable doubt.

H. Petitioner was denied due process of law when the trial court instructed the jury on the elements of second-degree murder but did not provide them with a verdict form for that lesser included offense.

(85 File doc. 1)

Petitioner was denied habeas corpus relief on these claims. See Carriger v. Lewis, 948 F.2d 588 (9th Cir. 1991); Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992).

Claims Raised in the Present Federal Habeas Corpus Petition

Petitioner raises the following claims in his present petition:

1. Petitioner is imprisoned in violation of his rights under the Fourteenth Amendment because no rational finder of fact could conclude beyond a reasonable doubt he murdered Robert Shaw in light of all the presently available evidence.

2. Petitioner's death sentence violates the Eighth and Fourteenth Amendments because of the Arizona courts' refusal to consider Robert Dunbar's involvement in the crime as a mitigating circumstance.

3. Petitioner's conviction and death sentence violate the Sixth, Eighth and Fourteenth Amendments because the state failed to disclose exculpatory evidence undermining the credibility of Robert Dunbar and indicating he was the actual murderer.

4. Petitioner's conviction and death sentence violate the Fourteenth Amendment because he was incompetent to stand trial and to be sentenced due to longstanding mental illness.

5. Petitioner's death sentence violates the Sixth, Eighth and Fourteenth Amendments because his court-appointed lawyers failed to provide him effective assistance of counsel at his 1982 resentencing.

(95 File doc. 1)

First Claim.

Petitioner's first claim for relief is an "actual innocence" claim. Petitioner argues that no direct evidence connected him to the crime, that the circumstantial evidence was consistent with the defense theory that Dunbar committed the crime and framed Petitioner, and that even more circumstantial evidence implicated Dunbar. In addition, Petitioner argues that the following evidence came to light after his conviction: Dunbar was violent and had committed robberies; on other occasions Dunbar had provided false information to the authorities; in 1987 Dunbar's ex-wife said Dunbar admitted framing Petitioner and she admitted providing a false alibi; in 1987 Dunbar confessed under oath that he committed the murder; several years later, Dunbar confessed to his prison cellmate the he had killed Mr. Shaw. Petitioner argues that the jury would not and could not have convicted him had it heard this evidence, which was not then available or was not presented due to constitutional error. (95 File doc. 1 at 10–16)

This claim was presented in Petitioner's second and third petitions for post-conviction relief in state court. The state court rejected the claim on the merits. (R.O.A. 312,400)

Petitioner has accompanied his actual innocence claim with an assertion of constitutional error at trial (incompetency to stand trial and withholding of evidence). A claim of "actual innocence" is not itself a constitutional claim, "but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. ___, 113 S. Ct. 853, 862 (1993). As stated earlier, if Petitioner presents evidence of innocence so strong that the Court cannot have confidence in the outcome of the trial unless the Court is also satisfied that he trial was free of nonharmless constitutional error, Petitioner "should be allowed to pass through the gateway and argue the merits of his underlying claims." Schlup v. Delo, ___ U.S. ___, 115 S. Ct. 851, 861 (1995). Petitioner must establish that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" by showing that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. at 867. The Court must consider the probative force of all relevant evidence on a reasonable juror, including

evidence alleged to have been illegally admitted and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial. Id. The Court also may determine how the timing of the submission of evidence ad credibility of affiants bear on the probable reliability of that evidence. Id. at 868-69.

At Petitioner's trial in 1978, crucial physical evidence linked Petitioner to the homicide:

- Petitioner's fingerprint was found on the tape binding the victim's hand.
- Jackie McCullar testified that Dunbar and Petitioner drove to her house and Petitioner walked up to her porch and handed her two cases. Later, the attache case was discovered to contain the stolen jewelry. The other case contained a gun.
- There was evidence that the key which opened the attache case was the same key taken from Petitioner when he was arrested.
- Petitioner's fingerprints were found on a gun cleaning kit inside the gun case.
- Other testimony established that a discarded pair of shoes belonged to Petitioner. A criminalist testified that he detected bloodstains on the shoes, but he could not determine whether the stains were animal or human blood.
- Clothing discarded along a road and in a canal was identified as belonging to Petitioner.

This evidence, without the testimony of Dunbar, would sustain the verdict. Dunbar's testimony corroborated the physical evidence.

Petitioner did not testify at trial; however, he did testify at a post-conviction relief hearing in 1982. Petitioner testified that on the morning of the day of the murder he called his boss and told him he would not be in to work. (R.T. 10/21/82 at 28; Resp. Attach. X) Petitioner and Dunbar spend the rest of the morning and early afternoon shopping. (Id. at 29-32, 36-39). Dunbar purchased a gun with money Petitioner had given him. (R.T. 10/21/82 at 33-36; Resp. Attach. W) They also went to Mr. Shaw's jewelry store where Dunbar had the crystal on his watch repaired. (Id. at 37-38) They returned to Dunbar's home at about 3:30 or 4:00 p.m. (Id.) (This testimony was basically the same as Dunbar's trial testimony.) The murder occurred between 4:00 and 6:00 p.m. At trial, Petitioner had no alibi for his whereabouts at the time of the murder.

Shortly before his arrest, Petitioner altered his appearance by shaving his head. (R.T. 7/13/78 at 50)

At an evidentiary hearing for post-conviction relief proceedings in 1987, a criminalist testified (as an offer of proof) that he reconstructed the eight-foot length of tape cut off of the victim's hands, and determined that Petitioner's fingerprint was located twenty-one and one-half inches from the end of the tape. (R.T. 12/11/87 at 51, 56-57)[4] This evidence countered Petitioner's argument that his fingerprint was already on the end of the tape prior to the murder and Dunbar took the tape out of his van without his knowledge.

The Court finds that it is more likely than not that any reasonable juror would still have found Petitioner guilty beyond a reasonable doubt despite Petitioner's "newly discovered" evidence. The evidence of Dunbar's alleged violence and robberies merely serves to attack Dunbar's credibility. It is information from a presentence report contained in Dunbar's Department of Corrections file. (Resp. Attach. EE) The report says that a 1968 polygraph test report says: "[Dunbar] said that about two and a half to three years ago, he was not sure, he, and apparently two others, committed armed robbery in Phoenix and in California. . . He denied being involved in a bank robbery. . .he said a gun was not used, that they would point their fingers under a coat at the victims." This evidence would probably have been inadmissible at trial. See State v. Madsen, 125 Ariz. 346, 351, 609 P.2d 1046, 1051 (1980) ("In Arizona, it is error, absent a stipulation between parties, to refer at trial to polygraph examinations for any reason."). The statement appears to have been written by the pre-sentence investigator based on information from the polygraph operator. Its reliability is suspect. Petitioner has not shown that either of these persons would have been available to testify that Dunbar

---

4. At the evidentiary hearing, Petitioner did not put on experts challenging the fingerprint evidence, even though he had informed the state that he planned to do so. Therefore, the state was not allowed to have the criminalist's testimony admitted as evidence. However, the state was allowed to make it an offer of proof. Petitioner had the criminalist's report a week before the hearing, interviewed him, and cross-examined him at the hearing. (R.T. 12/11/87 at 4-6, 57-66) This Court can properly consider the testimony in deciding Petitioner's actual innocence claim. Pursuant to Schlup, the reviewing court is to consider the probative force of "all the evidence" including "relevant evidence that was either excluded or unavailable at trial." 115 S. Ct. at 867.

actually made such a statement. See United States v. Williams, 668 F.2d 1064, 1067 (9th Cir. 1981); Dickinson Supply, Inc. v. Montana-Dakota Utilities Co., 423 F.2d 106, 109 (8th Cir. 1970). In addition, the statement was ten years old. (R.T. 8/28/87 at 91.) Even if it had been admitted to impeach Dunbar, the result would likely have been the same. The jury already knew that Dunbar had six prior felony convictions for burglary, that he had committed a burglary just three days prior to the murder, that he lied on a gun registration form, and that on one occasion he had struck his step-daughter. See discussion infra. at 23–24. Nevertheless, the jury believed Dunbar. There was enough corroborating evidence in the case for the jury to believe Dunbar's testimony was truthful.

Petitioner also points to evidence that Dunbar had a history of providing false information to the authorities. That evidence is discussed in detail below with respect to Petitioner's third claim. Dunbar's possible bias and motive for testifying against Petitioner, and evidence that Dunbar had lied on other occasions, was brought out at trial. See discussion infra at 23–24. It is unlikely that Petitioner's additional impeachment evidence would have caused the jury to reach a different verdict in this case. See Clark v. Lewis, 1 F.3d 814, 824 (9th Cir. 1993) (holding that impeachment evidence seldom, if ever, can establish innocence of the death penalty); Allen v. Nix, 55 F.3d 414, 417 (8th Cir. 1995) (holding that impeachment evidence was insufficient to establish actual innocence).

Next, Petitioner relies on the 1987 testimony of Joyce Stevens, Dunbar's ex-wife, who recanted her 1978 trial testimony. At trial, Ms. Stevens (then married to Dunbar) testified that Dunbar was at home asleep at the time of the murder. Nine years later, at an evidentiary hearing in state court on Petitioner's second petition for post-conviction relief, Ms. Stevens said her trial testimony was false. (R.T. 8/27/87) She testified that on the day in question, Dunbar left their house carrying something round wrapped in a towel, and that the iron skillet used in the murder appeared to be one from a set she had. (Id. at 18–20, 24) She also testified that a couple years after the trial Dunbar told her that he and Petitioner had entered the jewelry store through the back door and he (Dunbar) killed Mr. Shaw. (*Id.* at 32) The state court judge who conducted the hearing found that Ms. Stevens was not a credible witness. (R.O.A. 312) A state court's factual findings (including credibility of witnesses) are presumed correct if fairly supported by the record. Marshall v. Lonberger, 459 U.S. 422 432, 103 S.Ct. 843 (1983). The state court's finding is fairly supported by the record. Only a month before the hearing, Ms. Stevens told the state's attorneys that her trial testimony was the truth.

(R.T. of 8/27/87 at 83–84) Her hearing testimony conflicted with the physical evidence in significant ways including evidence at trial that there was no back door to the jewelry store. It is also incredible that Dunbar would take a skillet with him to perpetrate a burglary. The only logical and credible evidence about the skillet was that it came from the hot plate inside the jewelry store. In many instances, Ms. Stevens could not remember facts about which she had given statements only a year before. (Id. at 27–28, 52, 55–57, 63, 66, 72–73) Her testimony was that of a recanting witness who had been given testimonial immunity. (Id. at 8) She admitted that she was angry with Dunbar for mistreating her and her children, and that she hoped to obtain police protection and to see Dunbar stay in prison as a result of her testimony. (Id. at 97–98) Furthermore, although her testimony (if believed) implicated Dunbar, it did nothing to exonerate Petitioner. A reasonable juror would still have found Petitioner guilty beyond a reasonable doubt.

Petitioner also relies on Dunbar's 1987 confession. At trial, Dunbar testified about how Petitioner told him about the robbery and murder, how he helped Petitioner dispose of clothes and other physical evidence, and how he tried to sell some of the jewelry for Petitioner. On August 28, 1987, at the evidentiary hearing in state court, Dunbar denied Ms. Stevens' allegations and affirmed his prior trial testimony. However, on October 30, 1987, he testified that his trial testimony was false and that he and Ms. Stevens committed the robbery and murder. (Pet. Ex. E) He said that it was Ms. Stevens who panicked and wanted to kill Mt. Shaw and that when Dunbar would not shoot him, she struck him with the skillet. Dunbar also testified that Ms. Stevens had participated in more than ten burglaries with him. (Id. at 9, 13, 43–45) A few weeks later, on December 11, 1987, Dunbar recanted this confession. (Pet. Ex. F) He said that he gave that false testimony in order to get even with his ex-wife because she lied. He was also angry with the County Attorney's Office because he received an eleven-year sentence for recent burglaries, and the Attorney General's Office because they would not help him get transferred to another prison. Dunbar also believed he could sell his story to a publisher. (Id. at 73–83, 95–100, 136) The state court found that Dunbar's confession of October 30, 1987, was incredible and inconsistent with the physical evidence, testimony of other trial witnesses, and his prior trial testimony. (R.O.A. 312) The state court also found that Dunbar obviously fabricated his "confession" for revenge and monetary gain. (Id.) These findings are fairly supported by the record.

At the culmination of the 1987 evidentiary hearing, the state court held:

> Dunbar's 1978 trial testimony is supported by the physical evidence and the testimony of other witnesses such as Jackie McCullar and Dennis Stevens. Crucial physical evidence linking Petitioner to the homicide includes his fingerprint on the tape binding the victim's hands, the attache case key found in Petitioner's property, the discarded clothes with the inside pockets removed where Carriger customarily placed his initials, Carriger's prints on the gun case, and the boots worn during the robbery which a number of witnesses in previous proceedings testified belonged to Petitioner. The evidence plainly establishes Petitioner's guilt.
>
> The theory of Petitioner that Dunbar planted most of the physical evidence as part of an elaborate scheme to frame Carriger is without merit. It is obvious from these proceedings that Dunbar is not capable of either perpetrating or perpetuating such a scheme. He could not even stick to his claim that his trial testimony was false for more than a couple of weeks. What happened here confirms what the Supreme Court said in 1984; "[n]othing presented to this Court indicates Dunbar has the ability to conceive such a story and maintain it under questioning." 143 Ariz. at 151.

(R.O.A. 312) This Court finds that any reasonable juror would conclude that Dunbar's recanting testimony of October 30, 1987, is clearly incredible.

Last, Petitioner alleges that Dunbar again confessed to the murder. In support of this allegation, Petitioner submits the affidavit of Bernard Campbell dated September 26, 1993. (Pet. Ex. A) Mr. Campbell's affidavit states that he is an inmate at the Perryville state prison. He met Dunbar in 1989 and was his cellmate from April to December 1991. The affidavit further states:

> While I was housed with Bob [Dunbar], I heard from other inmates in Perryville that Bob had snitched on a guy. Bob told me personally he had killed a guy. Bob was aware of convicts ethics which state you just do not snitch.
>
> Bob denied that he had "snitched." He also said that Paris [Carriger] was the one who had "snitched" about the killing. Bob told me that Paris took Bob's gun, went to the police and told them everything.
>
> A law clerk at Perryville insisted that Bob was lying, so I looked up the case in the law books. The case indicated that Bob had been the snitch, so I confronted him about it.

> Bob admitted that he killed Robert Shaw so that Shaw could not identify him. Bob said that he only thing he could do was blame Paris for it because Bob did not want to take the "fall."
>
> Bob did not say that Paris was there when Mr. Shaw was killed.

(Pet. Ex. A) The state court's finding that the affidavit is incredible is fairly supported by the record. (R.O.A. 400) The affidavit does not say when Dunbar made these admissions. Dunbar died in December of 1991. (95 File doc. 1 at 8) Assuming that Dunbar made the statements sometime in 1991, they were made thirteen years after the trial. In addition, Mr. Campbell's account of what Dunbar told him would be inadmissible hearsay. There are no corroborating circumstances or other indicia of reliability. Furthermore, Dunbar obviously had a strong motive to lie to Mr. Campbell. Dunbar was in a dangerous position having been labeled as a "snitch" in prison. It is clear from the affidavit that Dunbar "confessed" only because Mr. Campbell pressured him for an explanation. It would be to his advantage to have other inmates believe he had murdered someone. Thus, the belated "confession" is incredible. In contrast, Dunbar's 1978 trial testimony is consistent with the physical evidence and is corroborated by the testimony of other trial witnesses. The Court finds that the verdict probably would not have been altered.

In sum, the Court concludes that Petitioner has failed to show that is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. Therefore, a review on the merits of his underlying constitutional claims is not justified under the "actual innocence" exception.

Second Claim.

For his second claim, Petitioner argues that the state court in post-conviction relief proceedings failed to recognize the "new" evidence implicating Dunbar to be a mitigating circumstance and improperly refused to reconsider Petitioner's death sentence in light of that evidence. (95 File doc. 1 at 17–18) After the post-conviction relief hearing in 1987, the state court held:

> Petitioner's final claim is that he should be resentenced to life. The basic claim is that Dunbar's recantation calls into question applicability of the death penalty. Also, it is claimed that no death penalty should stand on the testimony of someone of Dunbar's character. This latter claim was made in 1982 and rejected by the Supreme Court and is therefore precluded. 143 Ariz. at 162.

> The murder here was clearly cruel, heinous and depraved. It was also committed for pecuniary gain; further, Carriger had previously been convicted of a felony that included the use or threat of violence on another person. Accordingly, there are sufficient aggravating circumstances to support the death penalty.
>
> The evidence shows the murder was committed by Carriger; Dunbar's recantation is simply unbelievable. The testimony of other witnesses even if believed in its entirety indicates Dunbar was there and may have participated in the robbery and homicide. However, it does not exonerate or mitigate Petitioner's role in the murder of Mr. Shaw.

(R.O.A. 312) Regarding the testimony of the "other witnesses," the state court further held: "The statements attributed to Dunbar by these witnesses do not raise more than vague inferences that he was involved with Carriger in the robbery and homicide." (Id.) In 1994, the state court again rejected Petitioner's claim that his death sentence must be vacated, finding that Mr. Campbell's affidavit was unreliable and incredible. (R.O.A. 400) The Arizona Supreme Court denied the petitions for review of these decisions.

Petitioner is not entitled to relief on this claim. Claims of error in the state post-conviction review process are not addressable through habeas corpus proceedings. Franzen v. Brinkman, 877 F.2d 26 (9th Cir.), cert. denied, 493 U.S. 1012 (1989); Bonin v. Vasquez, 794 F. Supp. 957, 989 (C.D. Calif. 1992), aff'd, 59 F.3d 815 (9th Cir. 1995).[5]

Alternatively, as the record set out above shows, the state court did reconsider Petitioner's sentencing in light of the alleged new evidence. The state court did not find that the evidence was not a mitigating factor, rather, the court accorded it very little weight. A sentencer is not required to find the proffered evidence mitigating, nor must the sentencer accord the evidence the weight a defendant believes is appropriate. Eddings v. Oklahoma, 455 U.S. 104, 14-15, 117, 102 S. Ct. 869, 877-78 (1982). The state court's findings regarding lack of credibility are all fairly supported by the record. There was no constitutional violation.

---

5. Because Franzen is controlling, it is not necessary for the Court to reach the issue of whether this claim is an abuse of the writ.

Third Claim.

Regarding the third claim, Petitioner alleges that Dunbar was an informant for the police department and had a history of providing false information and that the state failed to disclose these facts to the defense at the time of the trial. In addition, Petitioner alleges that he state subsequently failed to disclose a 1987 letter written by Dunbar confessing to the murder. (95 file doc. 1 at 18-22) The state court considered these claims and rejected them on the merits. (R.O.A. 400)

With respect to the informant issue, the claim is abusive because it could have been and was not presented in the first habeas petition. In 1982, in post-conviction proceedings in state court, Petitioner filed various exhibits comprised of communications by Petitioner to his trial counsel in 1978. (R.O.A. 126) In a letter to his trial counsel, Petitioner states: "Bobby Dunbar was the informant for the state against John Douglas Troutman for a safe burglary of the National Cash Register Company (Sic)." (Id.) In another document, Petitioner refers to Dunbar's "known reputation as a snitch." (Id.) Furthermore, in a motion for reconsideration filed in 1984, Petitioner refers to "[t]he Department of Correction files which now reveal the wealth of Brady material that could have been relied upon to cross examine Robert Dunbar." (Resp. Attach. EE) The exhibits to that motion make various references to the fact that Dunbar was an informant.[6] Thus, the fact that Dunbar was an informant was known to Petitioner and appeared in the state court record prior to the filing of the first habeas petition in 1985. It also was known, or easily could have been ascertained, that the state had not disclosed such information (assuming the state had such information). Petitioner has not shown cause for failing to raise this claim earlier.

The claim that the state failed to disclose Dunbar's history of providing false information is also an abuse of the writ because the claim was identified prior to the filing of the first habeas petition. In 1981,

---

6. See the Motion for Reconsideration (Resp. Attach. EE), filed by Petitioner in the Arizona Supreme Court on December 26, 1984, exhibit A (pp. 3, 73) which is a 1982 interview of Dunbar by Petitioner's counsel, and Exhibit D, Presentence Report re State v. Dunbar (p. 12). See also R.O.A. 185 (p. 26) which is Petitioner's Memorandum on Resentencing filed November 2, 1982, which states: "As an individual who was a friend of Dunbar's, Carriger nonetheless knew of Dunbar's history of 'snitching' and lying. "

Petitioner filed a petition for post-conviction relief in state court which alleged:

> [D]efense counsel [failed] to seek and obtain Brady material from the state which would tend to impeach the credibility of Robert Dunbar. This material would include, but not necessarily be limited to, the state prison file of Dunbar and other materials showing the bad reputation for truth and dishonesty of Dunbar and further, the character trait of blaming others for his own misdeeds.

(R.O.A. 108) In September 1982, Petitioner filed a Motion for Disclosure requesting Dunbar's Department of Correction file. (R.O.A. 138) Petitioner's Memorandum on Post-Conviction Relief, filed October 17, 1982, describes the evidence of Dunbar's history of lying to the police which was contained in the Department of Corrections records and which Petitioner now claims the state failed to disclose at trial. (R.O.A. 175)[7] Thus, the evidence in question appears in the state court record prior to 1985. It also was known that the state had not disclosed this evidence (assuming the state had such evidence). Petitioner has not shown cause for failing to raise this issue in the first habeas petition.

Furthermore, there is no prejudice. Dunbar's possible bias and motive was brought out at trial, as well as evidence that he was a liar. Dunbar admitted during direct examination that he had six prior felony convictions for burglary and was currently on probation for his last conviction. (R.T. 7/13/78 at 11) He testified that he had committed another burglary just three days before the date of the murder. (Id.) He also explained that he was motivated to testify against Petitioner because in exchange for his testimony he had been granted immunity for the burglary and for purchasing a gun (a parole violation). (Id. at 44, 53) Dunbar admitted that on the day of the murder he had purchased a gun for Petitioner and lied on the registration form about being a convicted felon and gave an incorrect address. (Id. at 8) He also said that if Petitioner had committed only a robbery, and not a murder, Dunbar would not have turned him in. (Id. at 54) During cross-examination, Petitioner's counsel questioned Dunbar extensively about various subjects and repeatedly impeached him with prior inconsistent statements. (R.T. of 7/14/78 at 16-17) In addition, Dunbar admitted that he quit a job because he was

---

7. See also Petitioner's Memorandum on Resentencing, filed November 2, 1982, discussing Dunbar's Department of Corrections file and a defendant's right to obtain favorable evidence pursuant to Brady. (R.O.A. 185 at 15)

accused of stealing money, and he quit another job after money was missing. (Id. at 8–11) He had been discharged form the Army after six months with less than an honorable discharge. (Id. at 11) Dunbar admitted that he was broke and in debt and had filed bankruptcy that year. (Id. at 58) It was even established that he had struck his step-daughter. (Id. at 36) Petitioner's counsel also aggressively pursued a line of questioning attempting to show that it was Dunbar, not Petitioner, who committed the robbery and murder. (Id. at 68–71)

Dunbar's Department of Corrections file does contain documents relating how on several occasions Dunbar committed burglaries and then lied to police, in one case blaming the crime on another person. However, the documents also show that Dunbar confessed when the police questioned his incredible stories. This evidence does not tend to show that Dunbar could create an elaborate story to frame Petitioner and maintain it under questioning by the police, prosecution attorneys, and defense counsel.

Thus, the evidence of Dunbar's informant status and history of lying to the authorities would have added very little to the wealth of negative information about Dunbar's veracity which was presented to the jury. It is highly improbable that the verdict would have been different because of it. Therefore, prejudice cannot be established.

Regarding the 1987 confession letter, Dunbar wrote the letter to Susan Stewart, a church member participating in a jail ministry program. (Pet. Ex. C) In her affidavit, Ms. Stewart states that Dunbar confessed to a murder, but she cannot remember the details described in the letter. (Id.) She says that a woman with the prosecutor's office asked her to mail them the letter and that she did so. (Id.) At the post-conviction relief hearing on October 10, 1987, Dunbar testified about how he had committed the robbery and murder of Mr. Shaw. (Pet. Ex. E) Dunbar also testified that he made the same confession in a letter he had sent to Ms. Stewart. (Id. at 72) At the hearing on December 11, 1987, Dunbar recanted his confession. (Pet. Ex. F.) He also testified that his statements in the letter were lies. (Id. at 127)

Petitioner's claim is based on the state's failure to disclose the letter prior to the hearing. Because this claim could not have been raised before 1987, there is cause for Petitioner's failure to include the claim in the first habeas petition. However, Petitioner cannot show a prejudice. The letter would be merely cumulative of Dunbar's confession and testimony at the October 30, 1987 hearing. It is therefore insignificant. In addition, Dunbar retracted his confession and the letter a few weeks later. Moreover, Dunbar's "confession" was not credible. See discussion supra,

at 16-17. The result of the hearing would not have changed if the letter had been available.

The Court has already determined that there would not be a fundamental miscarriage of justice if the third claim not heard on the merits. See discussion of the First Claim, supra.

Alternatively, Petitioner has not met the requirements of a claim based on Brady v. Maryland, 373 U.S. 83, S. Ct. 1194 (1963). A successful Brady claim requires three findings: 1) the prosecution suppressed the evidence; 2) the evidence was favorable to the accused; and 3) the evidence was material to the issue of guilt or punishment. Id. See also Harris v. Vasquez, 949 F.2d 1497, 1528 (9th Cir. 1990). Petitioner has not show that the state suppressed Dunbar's Department of Corrections file. In addition, as discussed above, it is very unlikely that the outcome of Petitioner's trial would have been different if the additional impeachment evidence had been presented to the jury. See e.g., Griffith v. Delo, 33 F.3d 895, 904 (8th Cir. 1994) (undisclosed evidence of principal witness' arrest for assault and impersonation of officer was not "material" where petitioner's cross-examination of witness revealed other criminal history and misconduct). In addition, Petitioner has not shown that the state actually received the letter and withheld it. The state has no record of having requested or having received the letter. (R.O.A. 363) The state court found that the state did not withhold the letter. (R.O.A. 400) Moreover, for the reasons stated above, the letter was not "material."

Fourth Claim.

In the fourth claim, Petitioner states that prior to the 1978 trial which resulted in his conviction and death sentence, he had a lengthy documented history of severe mental illness and incompetency. Petitioner further states that despite this history, his trial counsel made no motion to determine his competency to stand trial, nor did the trial court sua sponte order such an evaluation. A psychiatric evaluation was done two months later prior to sentencing and he was determined to be competent for that proceeding. For his 1982 resentencing proceeding a competency determination was not made. Now, seventeen years after his trial, Petitioner argues that his constitutional rights were violated because the trial court failed to order a psychiatric examination to determine whether Petitioner was competent to stand trial in 1978 and to be resentenced in 1982. Petitioner also claims that his counsel for trial rendered ineffective assistance in failing to

investigate Petitioner's psychiatric history and present appropriate legal argument based on it. (95 File doc. 1 at 23-331)[8]

The state court ruled that these claims were precluded because they should have been raised previously. (R.O.A. 400) Thus, the claims are procedurally defaulted. The claims are also an abuse of the writ because they could have been and were not presented in Petitioner's first federal habeas petition in 1985. The Court cannot decide the merits of the claims because Petitioner has utterly failed to show cause and prejudice.

The record shows that prior to Petitioner's sentencing in 1978, his counsel moved the trial court to order an examination to determine whether Petitioner was competent to be sentenced. (R.O.A. 73) The motion was based on "the fact that the defendant has been treated on two separate occasions at the Arizona State Hospital" and on "personal observation by the defendant's counsel." (Id.) The trial court appointed three psychiatrists to examine petitioner. (R.O.A. 75) On September 22, 1978, Dr. Otto Bendheim evaluated Petitioner's competency to be sentenced. His report states, in part:

> Background information was provided by Thurman Gay, Esq., defense counsel. Unfortunately I was unable to obtain the records of the Arizona State Hospital. However, I had access to my own records of July 10, 1967 when I examined this man for the Superior Court. . . .
>
> The defendant is able to understand the proceeding against him. He is competent to be sentenced at this time. He has a full understanding, both factual as well as fairly rational, of the concept of waiver of rights, the concept of entering a plea of guilty and its possible consequences.
>
> However, it should be mentioned that this man has been suffering from a long standing psychotic process, schizophrenia, mainly paranoid, which is at present not particularly active, and does not prevent him from participating in court proceedings.

(Pet. Ex. N; R.O.A. 83) The other two psychiatrists also concluded that Petitioner was competent to be sentenced. (R.O.A. 81, 82) Dr. Tuchler described Petitioner as "a man of good intelligence, quite aware of the complexity of legal defenses which he considers himself an expert in," and

---

8. Petitioner did not raise these claims on direct appeal, in his first and second petitions for post-conviction relief in state court, or in his first federal habeas petition. Petitioner also claims that his counsel for resentencing in 1982 was ineffective for failing to request a competency examination. That claim is addressed in the discussion of the Fifth Claim, infra.

who describes himself as a "jailhouse lawyer" who has prepared writs for other inmates. (R.O.A. 82) The doctors' report also noted that as a teenager Petitioner was committed to the Fort Grant Juvenile Institution as "incorrigible." In 1960 he enlisted in the Air Force, but was honorably discharged after fifteen months for medical reasons (which he would not explain). He was at the Arizona State Hospital for several months in 1968 and 1969. (R.O.A. 81, 82)

Also in the record is the pre-sentence report. (R.O.A. 80) Petitioner stated to the officer preparing the pre-sentence report that in the Air Force he was required to undergo psychological and psychiatric tests after he hit his commanding officer with a trenching tool. The report also states that in 1964 Petitioner was sentenced to three to five years for second degree burglary. He was released on parole on March 1, 1966, and arrested on March 9, 1966 on a charge of grand theft from person. The charge was reduced to joyriding and Petitioner was returned to prison as a parole violator. Shortly after his release in 1967, Petitioner was arrested on charges of car theft, assault, and attempted murder. In that case Petitioner received a ten to twelve year sentence for grand theft and a nine to ten year sentence for aggravated battery with a prior conviction. A psychiatric report from the Arizona State Hospital dated November 13, 1967, stated that Petitioner was a sociopath personality, antisocial type, with extreme anger and hostility, who would try to manipulate any individual he came in contact with. (R.O.A. 80) The psychiatrist also found that Petitioner was without mental disorder and was able to assist counsel. In 1976, prior to a parole board hearing, Petitioner was diagnosed as having a paranoid personality disorder with antisocial feelings.[9] Petitioner ultimately was given an absolute discharge from the Department of Corrections in 1978. (Id.)

Thus, the facts upon which Petitioner now bases his incompetency claim (and ineffective-assistance-of-counsel claim) existed and even appeared in the record prior to 1985. A "petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." McCleskey,

---

9. Under Arizona Law, a person cannot be tried for an offense while, "as a result of a mental illness or defect," the person is unable to understand the proceedings or to assist in his own defense. Ariz. R. Crim. Proc. 11. A person can be found legally insane at the time of the offense if he had a "mental disease or defect." A.R.S. § 13-502. "Mental disease or defect" does not include personality disorders or character defects. Id.

499 U.S. at 498, 111 S. Ct. at 1472. Petitioner has not demonstrated cause to excuse the abuse of the writ or the procedural default.

In addition, Petitioner has not shown prejudice. Three psychiatrists determined that Petitioner was competent for the sentencing proceeding, which was only two months after the trial. There is also substantial contemporaneous evidence that prior to and during trial Petitioner understood the proceedings and assisted his counsel. Prior to trial, Petitioner wrote a letter to his counsel directing him to obtain affidavits from certain witnesses and to obtain Dunbar's and Petitioner's prison records, directing him to allege conflict of interest of a prosecuting attorney, providing counsel with information about Dunbar, and giving him fact-specific questions to use in Ms. Stevens' deposition. (R.O.A. 126) Petitioner also gave counsel examples of his good character, including the fact that for years he defended inmates in prison disciplinary court and was "active in the legal aspects of years of litigation attempting to change the prison system in the courts." (*Id.*) Petitioner told his counsel: "In fighting this case I want every little thing from every witness possible brought in. The sheer weight of numbers can sometimes do what the evidence can't and the more there is the better chance of reversible (sic) error. " (Id.) Petitioner also provided counsel with a list of 73 witnesses to be subpoenaed, a page-by-page analysis of Dunbar's deposition, a detailed analysis of the physical evidence, and a closing argument to the jury. (Id.) See also State v. Carriger, 143 Ariz. 142, 692 P.2d 991, 996 (1984) (discussing Petitioner's "extensive participation" in the preparation of his trial and appeal).

Petitioner simply has no evidence that he was incompetent to stand trial in 1978 or to be resentenced in 1982. The new expert opinions submitted by Petitioner are speculative at best. The opinions were rendered in 1994, sixteen years after the trial. A psychiatrist and psychologist conclude that it was "likely" that Petitioner was incompetent in light of his psychiatric history. (Pet. Ex. G at 20, 23; Pet. Ex. H. at 20, 21) In his 1994 affidavit, Dr. Bendheim states that Petitioner "might" have been incompetent to stand trial because an individual's psychiatric condition can change, but he affirms his original 1978 diagnosis that Petitioner was competent for sentencing. (Pet. Ex. I at 7, 8) The new opinions are not persuasive. See Harris v. Vasquez, 949 F.2d 1497, 1515 (9th Cir. 1990) (rejecting a claim based on new psychiatric opinions and noting that "psychiatrists disagree widely and frequently on what constitutes mental illness" and that a defendant could, if allowed, always provide a showing of factual innocence by hiring psychiatric experts who would reach a favorable conclusion).

Alternatively, the Court finds that Petitioner's due process rights were not violated. Due process requires the state court to conduct a competency hearing on its own motion whenever a reasonable judge would be expected to have a bona fide doubt as to the defendant's competence. United States v. Lewis, 991 F.2d 524, 527 (9th Cir. 1993). The issue before this Court is not whether Petitioner was in fact incompetent to stand trial in 1978, but whether the trial judge had evidence before her which should reasonably have caused her to doubt Petitioner's competence. See Id. "A good faith doubt about a defendant's competence arises if there is substantial evidence of incompetence." Id.

The new expert opinions rendered in 1994 were obviously not before the trial judge in 1978 (trial)or 1982 (resentencing). Therefore, they are not relevant to Petitioner's due process claim. See Lewis, 991 F.2d at 527 (rejecting as irrelevant a 1991 psychological evaluation offered as evidence of 1982 incompetence). Petitioner also points to his history of mental illness as documented in military records and a prior state court case, but he fails to allege that this material was presented to the trial judge. This Court's review of the record indicates that it was not. There was nothing before or during trial which should have caused the trial judge to doubt Petitioner's competency to stand trial. Petitioner further relies on the pre-sentence report which the judge reviewed a couple months after trial. However, even considering the report, there was no "substantial evidence of incompetence" before the judge. The report related that in 1967 Petitioner had been diagnosed as sociopath personality who was without mental disorder and was competent to be tried for aggravated battery. In addition, the judge had the opinions of three psychiatrists that Petitioner was competent to be sentenced (only two months after trial). Similarly, the trial judge did not have before her sufficient evidence to create a bona fide doubt as to Petitioner's competency for the 1982 resentencing proceedings.

In addition, and alternatively, the Court finds that Petitioner has failed to show that there was a reasonable probability that he would have been found incompetent. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Fifth Claim.

Petitioner's fifth claim and last claim is an ineffective-assistance-of-counsel claim in which Petitioner alleges that his counsel for the 1982 resentencing hearing failed to adequately investigate and present records and witnesses pertaining to Petitioner's family, social, medical, institutional, military and psychiatric history. Petitioner further alleges that his counsel failed to consult with and present the testimony of any mental health experts, and failed to investigate whether he was competent to be

sentenced. In addition, he claims that counsel should have objected and moved to recuse the trial judge based on an exparte communication between the court and the state prior to Petitioner's sentencing hearing. He also claims that counsel should have challenged the evidence of a prior conviction submitted as an aggravating circumstance. (95 File doc. 1 at 31-38)

In a post-conviction relief proceeding, the state court held that these claims were precluded because they should have been raised in the earlier post-conviction proceeding. (R.O.A. 400) Thus, the claims are procedurally defaulted.

In his present federal habeas petition, Petitioner does not dispute that his ineffective-assistance-of-counsel claim is new. Rather, he argues that the claim "was not raised in the earlier petition for habeas corpus relief filed (in 1985) because the same counsel who represented him at his 1982 (re)sentencing proceedings represented him in the earlier federal habeas corpus proceeding." (95 File doc. 1 at 40)

Initially it should be noted that Petitioner's claims regarding counsel's failure to object to the ex parte communication and prior conviction evidence pertain to alleged omissions by sentencing counsel in 1978, not resentencing counsel in 1982. The 1978 sentencing counsel and the federal habeas counsel were not the same persons. Thus, Petitioner's "same counsel" argument cannot apply to those claims. Those claims could have been raised in the first federal habeas petition. Petitioner has not alleged any cause to excuse the resulting abuse of the writ.

The other part of Petitioner's ineffective-assistance-of-counsel claim is that resentencing counsel failed to adequately investigate and present evidence of certain mitigating factors regarding his background. Because this claim was not raised in the first federal habeas petition, it is an abuse of the writ. Petitioner argues that there was "cause" because his counsel for resentencing was the same counsel who handled his first habeas petition. The Court disagrees.

Petitioner is really claiming that his first habeas counsel was ineffective for failing to raise (in the habeas petition) the issue of his own ineffectiveness at the resentencing stage. However, ineffective assistance of counsel can represent sufficient cause only when it rises to the level of an independent constitutional violation. Coleman v. Thompson, 501 U.S. 722, 755, 111 S. Ct. 2546, 2567-68 (1991). By definition, such a violation could not have occurred here because there is no Sixth Amendment right to counsel in federal habeas proceedings. Harris v. Vasquez, 949 F.2d 1497, 1513-14 (9th cir. 1990), cert. denied, 503 U.S. 910, 112 S. Ct. 1275 (1992); Pennsylvania v. Finley, 481 U.S. 551, 555,

107 S. Ct. 1990, 1993 (1987). In Bonin v. Vasquez, 999 F.2d 425, 429 (9th Cir. 1993), the Ninth Circuit held that a defendant has no Sixth Amendment right to counsel during his state habeas proceedings even if that was the first forum in which he could challenge constitutional effectiveness of trial counsel. The Bonin decision reasoned that granting a defendant the constitutional right to counsel at his "first possible" post-conviction proceeding would necessarily grant him that same right in all subsequent post-conviction proceedings. Id. The same reasoning applies in the present case. If allowed, a petitioner could keep the same counsel until all avenues for relief were exhausted and then file a new petition alleging that his former counsel was ineffective at every stage. There would be no end to the litigation. The Ninth Circuit has rejected the "same counsel as cause" argument in a recent decision, applying the principles and reasoning of Coleman and Bonin. See Jeffers v. Lewis, 1995 WL 566975 (9th cir. Sept. 13, 1995) (plurality opinion). Therefore, the failure of Petitioner's first habeas counsel to assert the ineffectiveness claim cannot constitute cause sufficient to overcome the abusive nature of his subsequent petition.

Furthermore, prior to the time of filing his 1985 habeas petition, Petitioner was knowledgeable of the facts necessary to a challenge to his counsel's effectiveness. Petitioner observed his counsel's performance at the 1982 resentencing hearing. He knew what records and witnesses his counsel did present and did not present pertaining to Petitioner's family, social, medical, institutional, military and psychiatric history. He knew that his counsel did not present the testimony of mental health experts. He certainly was aware of his own background, relevant biographical data and psychiatric history. (Those facts would be peculiarly within Petitioner's own knowledge.) Abuse-of-the-writ doctrine examines the petitioner's own conduct: The question is whether the petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege the claim in the first petition. McCleskey, 499 U.S. at 498, 111 S. Ct. at 1472. Because as early as 1982 Petitioner knew of the circumstances which he now alleges is incompetence of counsel, he cannot establish cause under McCleskey for failure to raise that claim in his 1985 petition. See Id., 499 U.S. at 498-99, 111 S. Ct. at 1472-73. See also Jeffers v. Lewis, 1995 WL 566975 (9th Cir. Sept. 13, 1995).

It is also clear from the record that Petitioner knew he had the option to make an ineffective-assistance-of-counsel claim and request that new counsel be appointed. After his trial, he did exactly that. On August 30, 1978, Petitioner filed on his own behalf in state court a handwritten "Motion to Appoint New Council for Appeal Because of a Conflict of

Interest Between Present Council and Raising the Issue of Incompetent Legal Council (sic)," in which he stated: "I, the petitioner, Paris Hoyt Carriger Hereby submit formal notice of my intent to raise the issue of incompetent Legal Council. this fact creates a definite conflict of interest in the situation of being represented beyond this point by my present attorney (sic)." (R.O.A. 72) In his motion, Petitioner alleged that his trial counsel was ineffective because he failed to investigate six witnesses, failed to call a witness who would establish Petitioner's probable innocence, and in closing argument improperly referred to exculpatory evidence which was never put before the jury during trial. In October 1978, Petitioner filed various motions on his own behalf including another "Motion to Appoint New Legal Council to Appeal (sic)" and "Motion to dismiss Court Appointed Council on the grounds of Incompetence (sic)." (R.O.A. 85). Thus, it is reasonable to assume that in 1982 Petitioner knew that an ineffective-assistance-of-counsel claim was legally possible and that he had the means to pursue it.[10] Nevertheless, Petitioner made no effort to replace his counsel after the 1982 resentencing proceeding, or proceed pro se and raise an ineffectiveness issue. Such a strategic choice constitutes a deliberate withholding of a claim, and subsequent assertion of that claim is abuse of the writ. See Booker v. Wainwright, 764 F.2d 1371 (11th Cir. 1985) (finding abuse of writ for failure to bring ineffective-assistance-of-counsel claim in first habeas petition was not excused even though trial/sentencing counsel was also habeas counsel)[11]; In re Shriner, 735 F.2d 1236 (11th Cir. 1984) (finding no cause for abuse of writ on ineffective-assistance-of-counsel claim even though habeas counsel was also trial counsel).

Because cause has not been established, the Court need not address the issue of prejudice. The Court has already determined that there would be no fundamental miscarriage of justice f Petitioner's belated claim is not reviewed on the merits. See discussion of the First Claim, supra.

---

10. In his second petition for post-conviction relief, Petitioner specifically requested that his resentencing counsel be appointed to represent him. (R.O.A. 204) He also acknowledged that he understood "that no further petitions concerning this conviction may be filed on any ground of which I am aware but do not raise at this time." (Id.)

11. In the Booker case, the petitioner claimed his counsel, who was his counsel for trial, sentencing, and the first federal habeas petition, was ineffective in failing to thoroughly investigate and present evidence of the petitioner's unhappy family background, limited education, military service and psychiatric hospitalizations over the yeas preceding the murder, in failing to obtain all of the hospital records pertaining to his psychiatric treatment, and in failing to have the petitioner examined by a neurologist.

Alternatively, the Court finds that Petitioner has failed to show that resentencing counsel's performance in not requesting a competency hearing was constitutionally deficient. Petitioner has also failed to show that there was a reasonable probability that he wold have been found incompetent. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

CONCLUSION

For the above-stated reasons, the Court concludes that Petitioner has failed to sufficiently support the First Claim alleging actual innocence, and therefore there would be no fundamental miscarriage of justice if his abusive habeas claims were not reviewed on the merits. Petitioner is not entitled to relief on the Second Claim because claims of error in the state post-conviction review process are not addressable through habeas corpus proceedings. In the alternative, the claim is without merit. The Court further concludes that he Third, Fourth, and Fifth Claims are an abuse of the writ and that Petitioner has failed to show cause and prejudice to overcome the procedural bar. Alternatively, the claims have not merit.

OTHER MATTERS

With his Traverse, Petitioner filed the following motions: 1) Motion for Evidentiary Hearing and Factual Findings Necessary to this Court's Determination Whether Habeas Relief is Warranted; 2) Motion for Order Releasing Physical Evidence for Defense Expert Examination; 3) Motion for Evidentiary Hearing on Petitioner's Incompetency to Stand Trial and be Sentenced; 4) Motion for Leave to Depose Witness Critical to Claim that State Failed to Disclose Exculpatory Evidence Devastating to the Credibility of its Star Witness; 5) Motion to Compel Respondent to File Answer in Compliance with Habeas Rules 4 and 5; 6) Motion for Order Directing the Maricopa County Superior Court Clerk to Provide Petitioner With a Copy of the Record on Appeal. Respondents have fled responses opposing all but the last motion.

1. **Motion for Evidentiary Hearing and Factual Findings**.

A federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances:

(1) the merits of a material factual dispute were not resolved in a state court hearing;

(2) the state factual determination is not fairly supported by the record as a whole;

(3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequately developed at the state court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 757 (1963).

For purposes of this rule, "newly discovered evidence" means "evidence which could not reasonably have been presented to the state trier of facts." 372 U.S. at 317. The federal court is under no obligation to grant a hearing upon incredible allegations of newly discovered evidence. Id. If there is no express finding of facts, the federal court must determine whether the state court impliedly found material facts. Id. at 314. A petitioner is not entitled to an evidentiary hearing if he has failed to develop the facts in state-court proceedings, unless he shows cause and prejudice or that a fundamental miscarriage of justice would result if a hearing were not held. Keeney v. Tamayo-Reyes, 504 U.S. 1, 11, 112 S. Ct. 1715, 1721 (1992).

In his motion for an evidentiary hearing, Petitioner identifies six factual issues which he contends are material to his habeas claims and which he contends were not resolved in a state court hearing.

First, contrary to Petitioner's assertions, the state court made all the necessary findings of fact to his claim that Dunbar's alleged involvement in the crime should have been considered as a mitigating circumstance. After the 1987 hearing on Petitioner's petition for post-conviction relief, the state court found: 1) Ms. Stevens' recanting testimony was credible; 2) even if believed, her recanting testimony did not exonerate Petitioner; 3) Dunbar's "confession" was not credible; 4) Dunbar's trial testimony was supported by the physical evidence and other witnesses' testimony; 5) crucial physical evidence linked Petitioner to the homicide; 6) the evidence plainly established Petitioner's guilt; 7) Dunbar did not "plant" the evidence or perpetrate an elaborate scheme to frame Petitioner; 8) Dunbar physically abused his step-children, and after the trial, he sexually abused at least one of the children; 9) Dunbar bragged about his ability to fool polygraph machines; 10) after the trial Dunbar was involved in criminal activity on a regular basis; 11) statements allegedly made by Dunbar after the trial raised merely vague inferences that he was involved in the murder; 12) none of the alleged statements exonerated Petitioner; 13) the "new evidence" would not have changed the verdict. (R.O.A 312, 329) The state court also reviewed the multiple aggravating circumstances supporting the death penalty and discussed Dunbar's alleged involvement as a mitigating circumstance:

> The evidence shows the murder was committed by Carriger; Dunbar's recantation is simply unbelievable. The testimony of other witnesses even if believed in its entirety indicates Dunbar was there and may have participated in the robbery and homicide. However, it does not exonerate or mitigate Petitioner's role in the murder of Mr. Shaw.

(R.O.A. 312)

Thus, the state court's decision implies that it found that even if Dunbar was involved in the crime, Petitioner's participation in and guilt for the murder was equal or greater. The state court was entitled to give this factor very little weight toward mitigation. The state court resolved all of the material factual issues, and its findings were fairly supported by the record.

Second, Petitioner is also mistaken in his argument that an evidentiary hearing is required to decide "whether the presently available evidence proves beyond a reasonable doubt that Petitioner was a major participant in the robbery of Robert Shaw, who acted with reckless indifference to human life." (95 File doc. 19 at 6) At the end of Petitioner's trial, despite his attempt to show that Dunbar had committed the crime and framed him, the jury decided that beyond a reasonable doubt Petitioner had murdered Mr. Shaw. Afterwards, Petitioner has petitioned the state court and this Court for relief claiming that there is newly discovered evidence which shows he is innocent. In Jeffries v. Blodgett, 5 F.3d 1180, 1187 (9th Cir. 1993), the Ninth Circuit affirmed a district court's denial of an evidentiary hearing, stating:

> The mere existence of newly discovered evidence relevant to guilt is not grounds for federal habeas relief - more is needed. Townsend v. Sain, 372 U.S. 293, 317, 83 S. Ct. 745, 759, 9 L. Ed.2d 770 (1963); Gordon v. Duran, 895 F.2d 610, 614 (9th Cri. 1990). (The petitioner) must show that the newly discovered evidence would probably have resulted in his acquittal. Gordon, 895 F.2d at 614–15; Quigg v. Crist, 616 F.2d 1107, 1112 (9th Cir.), cert. denied, 449 U.S. 993, 101 S. Ct. 323, 66 L.Ed.2d 150 (1980). Evidence which suggests only that some other individual might have committed the crime rather than a showing that the defendant did not commit the crime is insufficient to meet the 'probability of acquittal' standard. Quigg, 616 F.2d at 1112. [emphasis in original]

Petitioner's proffered newly discovered evidence suggests only that Dunbar might have committed the crime with Petitioner, it does not show that Petitioner did not commit the crime. As noted above, the state court

resolved all of the material factual issues. As set forth in the discussion of the First Claim, supra at 9, the state court and this Court have found that the newly discovered evidence probably would not have resulted in Petitioner's acquittal.

Related to this issue, it is not necessary to hold an evidentiary hearing on the state's offer of proof that Petitioner's fingerprint was not located on the end of the tape. Petitioner could have developed facts relating to that proof at the 1987 state court evidentiary hearing. In fact, Petitioner told the state that he intended to call and expert on the fingerprint evidence. (R.O.A. 281; R.T. 12/11/87 at 4-6) The state had the tape reconstructed in the first place because Petitioner was arguing that his fingerprint was already on the end of the tape and later taken to Mr. Shaw's store by Dunbar. (R.O.A. 2132 at 7) Petitioner had a copy of the criminalist's report a week prior to the hearing, interviewed him, and cross-examined him about his methods and opinions at the hearing. (R.T. 12/11/87 at 57-66) Petitioner did not call an expert at the 1987 hearing. The record shows that he did not make a request to examine the tape exhibits until 1993. (R.O.A. 373) Petitioner has not shown cause and prejudice, or a fundamental miscarriage of justice, to excuse his failure to develop any additional facts at the state court hearing. Furthermore, the state court did not rely on the state's offer of proof to reach its conclusion that Petitioner's newly discovered evidence would not have changed the verdict. (R.O.A. 312)

Third, there is not need to hold an evidentiary hearing on whether the state had possession of Dunbar's letter to Ms. Stewart. The state searched its entire file and computer docketing system and found nothing to indicate that it had ever received the letter. (R.O.A. 363 at 2-3) The state court made a specific factual findings that the state did not withhold the letter. (R.O.A. 400) That finding is fairly supported by the record. Petitioner's assertion that Ms. Funkhouser of the Attorney General's Office is likely the unidentified woman who spoke to Ms. Stewart is pure speculation. Petitioner did not develop that issue in any state court hearing, and has failed to allege any cause to excuse his failure to do so. Furthermore, in the discussion of the Third Claim, supra at 20, this Court has found that Petitioner cannot prevail on a Brady claim because the letter is not "material."

Further, Petitioner requests a hearing to establish Dunbar's status as a "snitch" for the police department and his history of "framing people." As set forth in the discussion of the Third Claim, supra at 20, Petitioner's claim based on those facts is barred as an abuse of the writ. In addition, the facts are already fully and fairly developed in the record. Moreover,

BEST AVAILABLE COPY

the facts are not "material" under Brady. Therefore, no hearing is needed or required.

Fifth, no hearing is required on the issue of Petitioner's competency for trial and resentencing because Petitioner's claim is procedurally defaulted and barred as an abuse of the writ. In addition, the record already contains all of the material facts necessary to this Court's alternative holding that Petitioner's due process rights were not violated. See discussion of the fourth Claim, supra at 26.

2. Motion for Order Releasing Physical Evidence.

Having denied Petitioner's motion for an evidentiary hearing on this issue for the reasons stated above, the Court denies Petitioner's motion for an order releasing the tape exhibits (exhibits 41, 42, 46, 48, 49) to Petitioner for scientific examination.

3. Motion for Evidentiary Hearing on Petitioner's Incompetency.

For the reasons stated above, the Court denies Petitioner's motion for an evidentiary hearing on his alleged incompetency to stand trial and be sentenced.

4. Motion for Leave to Depose Witness.

Having denied Petitioner's motion for an evidentiary hearing on this issue for the reasons stated above, the Court denies Petitioner's motion for leave to depose Ms. Funkhouser.

5. Motion to Compel Compliance with Habeas Rules 4 and 5.

The Court finds that Respondent's Answer to Petition for Writ of Habeas Corpus and the record submitted comply with Rules 4 and 5 of the Rules Governing § 2254 Cases in the United States District Court.

6. Motion for Order to Clerk to Provide Copy of Record.

Petitioner requests that the Court order the Clerk of the Maricopa County Superior Court to make another copy of the entire state court record. Petitioner does not contend that he is missing any part of the state court record. Rather, he contends that it would be more convenient for reference purposes if he had a copy identical to Respondents' state court record on appeal (complete with document identification numbers corresponding to the index of the record on appeal).

Although Petitioner has a valid concern, in light of the reasonable alternative (and the fact that the Petition is already fully briefed), the Court is not willing to order production of another copy of the record consisting of hundreds of pages of paper. With minimal time and effort, Petitioner can obtain a copy of the index of the record on appeal from this Court's file or the Clerk or the Maricopa County Superior Court, and mark his copy of the record to conform to the index.

Accordingly,

IT IS ORDERED denying with prejudice Petitioner's Petition for Writ of Habeas Corpus filed on August 8, 1995 **[file doc. no. 1]**.

IT IS FURTHER ORDERED denying with prejudice the following motions filed by Petitioner:

Motion for Evidentiary Hearing and Factual Findings necessary to this Court's Determination Whether Habeas Relief is Warranted **[file doc. no. 19]**;

Motion for Order Releasing Physical Evidence for Defense Expert Examination **[file doc. no. 13]**;

Motion for Evidentiary Hearing on Petitioner's Incompetency to Stand Trial and be Sentenced **[file doc. no. 16]**;

Motion for Leave to Depose Witness Critical to Claim that State Failed to Disclose Exculpatory Evidence Devastating to the Credibility of its Star Witness **[file doc no. 14]**;

Motion to Compel Respondent to File Answer in Compliance with Habeas Rules 4 and 5 **[file doc. no. 17]**;

Motion for Order Directing the Maricopa County Superior Court Clerk to Provide Petitioner with a Copy of the Record on Appeal **[file doc. no. 18]**;

Motion to Strike Portions of Respondents' Answer **[file doc. no. 271]**.

DATED this 1st day of November, 1995.

Paul G. Rosenblatt
United States District Judge

Copies to all counsel

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

RECEIVED FEB 24 '88
PROCESSED FEB 24 '88

RC06-82635 (Code) 2/22/88 (Date) HON. MICHAEL D. RYAN (Judge/Commissioner/Pro Tem) S.A. CUMMINGS (Deputy)

NO. CR 101609

STATE OF ARIZONA

Ass's Atty. General by:
Gerald Grant/Jessica Funkhouser

vs.

PARIS HOYT CARRIGER

Donald H. Bayles, Jr.
Flagstaff, Arizona

Robert Hirsh
Tucson, AZ.

The Court having considered the petition, supplemental petitions, responses, replies, files and records hearin; and having considered the testimony and arguments presented at the Evidentiary Hearing, makes the following specific findings of fact and states expressly its conclusions of law relating to the issues presented.

The Petitioner's conviction and sentence were affirmed on appeal. State v. Carriger, 123 Ariz. 335, 599 P.2d 788, cert. denied, 444 U.S. 1049 (1980). Thereafter, Petitioner filed his first Petition for Post-Conviction Relief. The Arizona Supreme Court granted relief to the extent of remanding the case for resentencing. State v. Carriger, 132 Ariz. 301, 645 P.2d 816 (1982). Petitioner was resentenced to death by Judge Carson. That sentence and a continuation of the first Petition for Post-Conviction Relief were considered by the Arizona Supreme Court in State v. Carriger, 143 Ariz. 142, 692 P.2d 991 (1984), cert. denied, 471 U.S. 1111 (1985). All relief was denied by the Supreme Court.

Petitioner is now seeking relief based upon a claim of newly discovered evidence. He is requesting a new trial or in the alternative a reduction of his sentence from death to life imprisonment.

The facts of this case are set forth in State v. Carriger, supra, 143 Ariz. at 149. The claim here is that newly discovered evidence concerning Robert Dunbar's credibility and his possible participation in the Shaw murder warrant a new trial or at least a reduction of the sentence. The claim here is that Dunbar committed the crime and that Dunbar's claim that he was asleep when the crime was committed is untrue.

The primary witness supporting this claim is Joyce Stevens, formerly Joyce Dunbar. Ms. Stevens is the ex-wife of Dunbar and testified at the trial in 1978. Under a grant of testimonial immunity here, she said her trial testimony was false and that Dunbar did not sleep during the time of the homicide. She further testified Dunbar later told her he used a skillet from her house to kill Shaw and that he and Carriger entered the jewelry store through the back door.

Ms. Stevens had never admitted these allegations before. She testified at these hearings that as late as July 2nd and 9th, 1987, she told the prosecution she would testify to what she had testified to in 1978. Only after she had been granted testimonial immunity did she make the allegations that Dunbar was involved in the Shaw homicide

Ms. Stevens' testimony of July 17, 1987, conflicts with the physical evidence in significant areas. These conflicts include her testimony that Dunbar told her he and Carriger entered the jewelry store through the back door. This is in direct conflict with the true facts. There was no back door to the jewelry store. Another example is her testimony concerning the skillet; her testimony that Dunbar took one of her skillets with him to the jewelry store and helped kill Mr. Shaw with it is incredible. The only logical and credible evidence regarding the skillet is that it came from the hot plate inside the jewelry store. The idea that someone would take a skillet to burglarize a jewelry store is absurd.

Ms. Steven's testimony is that of a recanting witness who had been given testimonial immunity. Her testimony on the crucial issues conflicts with the physical evidence and true facts. She is not a credible witness. Moreover, even if she were believed, her testimony does not exonerate Petitioner; it simply alleges Dunbar was a participant.

Robert Dunbar testified for the State in 1978. At these hearings he testified on August 28, 1987, that he would testify as he did in 1978. He denied Ms. Stevens' allegations. However, on October 30, 1987, Dunbar, without any grant of immunity and in the presence of his appointed

counsel, testified that his 1978 testimony was false and that he and Joyce Stevens committed the robbery and murdered Mr. Shaw.

The testimony of Dunbar at the hearing on October 30, 1987, was inconsistent with the physical evidence, testimony of other trial witnesses, and his prior testimony. On December 11, 1987, Dunbar, after receiving testimonial immunity, testified that the testimony he gave on October 30, 1987, was false. He said he gave that testimony to get even with his ex-wife for her false testimony, and to embarrass the prosecution and police. Additionally, he said he wanted to try and make money by selling his story. His desire to make money was confirmed by his attorney and Petitioner's attorney. Moreover, arrangements were made, at Dunbar's request, to maximize press coverage of his October 30, 1987, testimony.

Dunbar's recanting testimony of October 30th is clearly incredible. It conflicts with much of the physical evidence and testimony of other witnesses. Dunbar obviously gave that testimony for potential monetary gain and revenge. However, he did not stick to this story for long. As early as November 17, 1987, he wrote to the Court admitting that that testimony was false. He confirmed that on December 11, 1987.

Dunbar's 1978 trial testimony is supported by the physical evidence and the testimony of other witnesses such as Jackie McCullar and Dennis Stevens. Crucial physical evidence linking Petitioner to the homicide includes his fingerprint on the tape binding the victim's hands, the attache case key found in Petitioner's property, the discarded clothes with the inside pickets removed where Carriger customarily placed his initials, Carriger's prints on the gun case, and the boots worn during the robbery which a number of witnesses in previous proceedings testified belonged to Petitioner. The evidence plainly establishes Petitioner's guilt.

The theory of Petitioner that Dunbar planted most of the physical evidence as part of an elaborate scheme to frame Carriger is without merit. It is obvious from these proceedings that Dunbar is not capable of either perpetrating or perpetuating such a scheme. He could not even stick to his claim that his trial testimony was false for more than a couple weeks. What happened here confirms what the Supreme Court said in 1984: "[n]othing presented to this Court indicates Dunbar has the ability to conceive such a story and maintain it under questioning." 143 Ariz. at 151.

The testimony of other members of the Stevens family alleged physical and sexual abuse committed by Dunbar. Additionally, they and other witnesses testified about Dunbar's bragging about his ability to pass polygraph examinations, his criminal activities since the trial, and

statements Dunbar made that caused them to believe Dunbar was involved in the Shaw homicide and robbery.

The evidence presented here indicates Dunbar molested Stephanie Stevens in 1981, three years after the trial. Also, there is evidence of physical abuse. No official reports of either type of abuse were made and therefore no convictions resulted.

Nearly every witness testified that Dunbar bragged about his ability to pass polygraph examinations. Also, it has been established that Dunbar was involved in criminal activity on a fairly regular basis since the trial. It culminated in convictions for burglary and a sentence in 1986 of over eleven years in prison.

The statements attributed to Dunbar by these witnesses do not raise more than vague inferences that he was involved with Carriger in the robbery and homicide. No one exonerated Carriger.

For a claim of newly discovered evidence to warrant a new trial there must be a showing that the evidence is truly newly discovered, there was due diligence, the evidence is not merely cumulative or impeaching, it is material, and it must be evidence that would probably change the verdict. State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983), cert denied, 464 U.S. 865 (1983). "Further, if the motion relies on the existence of a witness willing to testify and present the new evidence at a new trial, such witness must appear to be credible to the trial judge hearing the motion." State v. Fisher, 141 Ariz. 227, 251, 686 P.2d 750 (1984), cert. denied, 469 U.S. 1066 (1984). Also, Rule 32.1(e), Rules of Criminal Procedure, 17 A.R.S., "contemplates facts in existence at the original trial or sentence which were not adduced, but had they been adduced could have changed the original verdict, finding or sentence." State v. Guthrie, 111 Ariz. 471, 473, 532 P.2d 862 (1975)(emphasis added). Finally, "there is no form of proof as unreliable as recanting testimony. State v. Fisher, supra, 141 Ariz. 251 (citations omitted).

The testimony of Joyce Stevens is clearly the testimony of a recanting witness. Her testimony concerning Dunbar's involvement in the homicide is incredible and would probably not change the verdict. Her testimony conflicts with the physical evidence, her prior testimony, and common sense.

The testimony of the witnesses who said they heard Dunbar bragging about his ability to pass polygraphs would not be admissible at trial. "In Arizona, it is error, absent a stipulation between parties, to refer at trial to polygraph examinations for any reason." State v. Madsen, 125 Ariz., 346, 351, 609 P.2d 346 (1980)(citations omitted). This testimony, not being admissible, could not therefore affect the verdict. Even if it were admitted,

the State then could arguably present testimony of the original examiner and the results of the exam thereby bolstering Dunbar's credibility. Further, a similar claim was presented in 1982; accordingly, it is not newly discovered evidence.

The testimony concerning the molestations of Stephanie Stevens and her sister would not be admissible at trial. See Rules 404(b), 608, 609, Rules of Evidence, 17A A.R.S. Further, these incidents occurred after the trial and therefore do not constitute newly discovered evidence. State v. Guthrie, supra. Additionally, this evidence was alluded to in 1982. Therefore, this evidence would not change the verdict.

The testimony that Dunbar physically abused the Stevens children would not be admissible at trial. Rule 404(b), and 609, supra. Therefore, it could not change the verdict.

Dunbar's recantation of his trial testimony would probably not change the verdict. The recanting testimony was in direct conflict with the physical evidence, the manner in which Shaw was murdered, and other testimony. Also, Dunbar later admitted that the recantation was a lie and he had done it for money and spite. The best that can be said is that Petitioner has shown this Court that Dunbar is a liar, albeit a poor one. However, the Jury in 1978 knew Dunbar was a felon six times over who had spent time in prison, who was a liar, a thief, a burglar, and a witness who demanded a deal and immunity before he testified.

The evidence presented here is another attack on the credibility of Dunbar's trial testimony. This was addressed at the 1982 hearing for Post-Conviction Relief with evidence that was in existence at the time of the trial. The evidence here in large part consists of statements and acts occurring years after the trial.

Dunbar's testimony at the trial in 1978 was corroborated by physical evidence and testimony from other sources. Nothing here refutes that to the point it would affect the verdict.

Petitioner's first appeal of his conviction attacked the conviction on the basis that it was grounded solely on circumstantial evidence and therefore must be reversed. 123 Ariz. at 339. The Arizona Supreme Court rejected that argument. Inherent in that holding is a finding that the physical evidence, without the testimony of Dunbar, could sustain the verdict. The fingerprint, the key, and the stolen property in the attache case all point to Carriger as the person or one of the persons who robbed and murdered Mr. Shaw. Dunbar's testimony was corroborative of this evidence.

The other witnesses who testified here were merely impeachment or cumulative witnesses who testimony, assuming relevancy and admissibility, would not have affected the verdict.

Petitioner's final claim is that he should be resentenced to life. The basic claim is that Dunbar's recantation calls into question the applicability of the death penalty. Also, it is claimed that no death penalty should stand on the testimony of someone of Dunbar's character. This latter claim was made in 1982 and rejected by the Supreme Court and is therefore precluded. 143 Ariz. at 162.

The murder here was clearly cruel, heinous and depraved. It was also committed for pecuniary gain; further, Carriger had previously been convicted of a felony that included the use or threat of violence on another person. Accordingly, there are sufficient aggravating circumstances to support the death penalty.

The evidence shows the murder was committed by Carriger; Dunbar's recantation is simply unbelievable. The testimony of the other witnesses even if believed in its entirety indicates Dunbar was there and may have participated in the robbery and homicide. However, it does not exonerate or mitigate Petitioner's role in the murder of Mr. Shaw.

Based on the foregoing, the Court hereby denies the Petitioner any relief.

The Petitioner is advised that he may within ten (10) days after this ruling move for a Rehearing, setting forth in detail the grounds wherein it is believed the Court erred. Failure to file the proper Motion within this time limit will extinguish any such claim.

The State must respond to Petitioner's Motion for Rehearing within ten (10) days of its filing.

Thereafter the Petitioner may file a Reply within ten (10) days.

APPENDIX E

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Received	Processed
JUN 15 '88	JUN 15'88
Clerk of Court	Distr. Ct

Clerk of the Court

RC06-82635	6/13/88	HON. MICHAEL D. RYAN	S.A. CUMMINGS
Code	Date	Judge/Commissioner/ProTem	Deputy

NO. CR 101609

STATE OF ARIZONA

vs

PARIS HOYT CARRIGER

Ass't. Atty. General by:
Gerald R. Grant
Jessica Funkhouser

Donald H. Bayles, Jr.
123 N. Leroux
Flagstaff, Arizona 86001

Robert Hirsh
177 N. Church St. #877
Tucson, Arizona 85701

Petitioner's Motion for Rehearing has been under advisement. The motion, response, reply, arguments of counsel, and files and testimony have been considered.

A careful review of Joyce Stevens' testimony shows she did not specifically testify Dunbar took a skillet with him. R.T. 8-27-87 at Page 24. However, the clear inference to be drawn from the testimony is that he did. Id at lines 5-6. Nevertheless, Joyce Stevens' testimony is that of a recanting witness and is inherently

incredible. Her testimony is not supported by the physical evidence and as late as July 2nd and July 9th, 1987, she affirmed her trial testimony given in 1978. R.T. 8-27-87 at 75. Her claim that she did this because of fear of Dunbar is unbelievable as Dunbar had much earlier been sentenced to prison for a term of 11.25 years of which he has to serve two-thirds of the sentence.

Petitioner's claim that Jackson v. Dugger F.2d (11th Cir., 2-1-88) mandates setting aside the death penalty here is not correct. Jackson dealt with a jury instruction given during the sentencing phase of a capital offense. Slip opinion at 9-11. Here, the sentence and its findings are solely the function of the trial judge. **A.R.S. §13-703**. Therefore, **Jackson** does not apply.

Accordingly, Petitioner's Motion for Rehearing is denied.

Page

APPENDIX F

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

RECEIVED APR 12'94 PROCESSED APR 13 '94
Clerk of the Court Distr. Clr.

CLERK OF THE COURT

April 11, 1994 HON. MICHAEL D. RYAN S. Cummings
Deputy

No. CR 101609

STATE OF ARIZONA

Attorney General
By Joseph T. Maziarz

v.

PARIS HOYT CARRIGER

Denise I. Young
Tempe

Appeals

The court has duly reviewed the petition, response, reply, files and records, and disregarding defects of form, it determines that no material issue of fact or law exists which would be served by any further proceedings;

Therefore, it is ordered dismissing the petition.

This order is based upon the following findings:

1. This is petitioner's third petition for post-conviction relief.[1] In this petition, he claims the following warrant setting aside his

---

1. The following published state and federal court opinions have ruled on petitioner's prior appeals or claims for relief: State v. Carriger, 123 Ariz. 335, 599 P.2d 788 (1979), cert. denied, 440 U.S. 1049 (1980); State v. Carriger, 132 Ariz. 301, 645 P.2d 816 (1982); State v. Carriger, 143 Ariz. 142, 692 P.2d 991 (1984), cert. denied, 471 U.S. 1111 (1985); Carriger v. Lewis, 948 F.2d 588 (9th Cir. 1991); Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992), cert. denied, 113 S.Ct. 1600 (1993). Additionally, petitoner's second petiton for post-conviction relief was heard by this court in 1987.

conviction or death sentence: (1) petitioner's cpnviction and sencence were the result of unrelliable and untruthful testimony of Robert Dunbar; (2) the State withheld exculpatory evidence; (3) petitioner was incompetent to be tried; (4) petitoner was incompetent to be sentenced; (5) the sentencing judge wrongly found one aggravating factor; (6) petitioner's prior felony conviction was invalid because he was insane at the time of thet offense; (7) the sentencing judge received ex parte information prior to sentencing; and (8) petitioner did not receive effective assistance of counsel at his resentencing. The State argues that the claims are precluded and if not precluded, they are not supported by newly-discovered evidence.

2. Petitioner contends that his conviction and sentence must be vacated because it is based upon the unreliable testimony of Robert Dunbar. This claim was previously ruled on in petitioner's second petition for post-conviction relief.[2] Now petitioner claims he has newly-discovered evidence. This evidence consists of an affidavit from Bernard Campbell, supposedly a former cellmate of Robert Dunbar. In State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28 (1989), the Arizona Supreme Court stated that

> [a] colorable claim in a newly-discovered evidence case is presented if the following five requirements are met: (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the

---

2. This court denied relief and petitioner sought review by the Arizona Supreme Court. That court denied review. Rules of Criminal Procedure, 17 A.R.S., Rule 32.9. This claim is essentially a repeat of the second petition for post-conviction relief. Petitioner again asserts his conviction is based *solely* upon the unreliable testimony of Robert Dunbar. This is simply not true. Substantial physical evidence linked petitoner to the murder. See Minute Entry of 2/22/88. Additionally, during the evidentiary hearing relative to the second petition for post-conviction relief, the State made an offer of proof concerning petitioner's fingerprints found on the tape that bound the victim. A *second* fingerprint was found at the *other* end of the tape. R.T. of 12/11/87 at 50-57, 63. While this evidence was not formally admitted, it is yet another piece of physical evidence conclusively linking petitioner to the murder. Consequently, another trial would have the same result as the first. Dunbar's credibility is therefore not the sole foundation upon which petitioner's conviction and sentence rest. Considerable physical evidence confirms the conviction and sentence. See State v. Carriger, supra, 143 Ariz. at 162.

> motion must allege facts from which the court could conclude the defendant was diligent in dicovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

(Citation omitted). See also State v. Fisher, 141 Ariz. 227, 251, 686 P.2d 750 (1984), cert. denied, 469 U.S. 1066 (1984). The evidence presented by way of Bernard Campbell's affidavit was not in existence at the time of trial.[3] Thus, it is not newly-discovered material evidence. Rules of Criminal Procedure, Rule 32.1(e). Second, there is absolutely no showing of any diligence. Third, it is impeachment evidence and cumulative to such evidence presented previously. Fourth, it is inadmissible as it is hearsay evidence. Rules of Evidence, 17A A.R.S., Rule 801(d)(1). Fifth, and most importantly, there is no indicia of reliability concerning the statement. According to the affidavit, Dunbar was confronted by Campbell about being a snitch. At first, Dunbar allegedly denied being a snitch. Dunbar was supposedly confronted again and then finally allegedly admitted he blamed petitioner for the murder. No evidence is presented as to when this statement was made. There are no corroborating facts that would lead one to believe there is any credibility to the

---

3.There can be circumstances where a subsequent statement changing prior testimony may be considered newly-discoverd evidence. See e.g. State v. Fisher, 176 Ariz. 69, 859 P.2d 179 (1993). Such circumstances are rare and particularly unreliable when the evidence consists of an alleged recantation testified to by a third party. State v.Fisher, supra, 141 Ariz. at 251.

statement.[4] Consequently, petitioner's claim on this ground is meritless.[5]

3. Petitioner claims the State withheld exculpatory evidence. This claim is based on letters Robert Dunbar allegedly sent to Susan Stewart. The letters were fully discussed at the evidentiary hearing in 1987. See R.T. of 10/30/87 at pages 72-73, and R.T. of 12/11/87 at 127-28. Dunbar admitted in 1987 he told Ms. Stewart he participated in the murder.[6] Petitioner was resprsented by two attorneys at that time. The name and location of the witness wer fully disclosed. Finally, an affidavit from the State's attorney at the time states he never received any such letters. Accordingly, the State did not withhold exculpatory evidence.[7] Finally, this does not constitute newly-discovered evidence. All the facts concerning the letters were known in 1987. Additionally, petitioner has not demonstrated any due diligence in trying to obtain the documents. State v. Bilke, supra, 162 Ariz. 51, 52-53.
4. Petitioner's third and fourth claims for relief contend that he was incompetent to be tried or sentenced. These claims are clearly precluded. Rule 32.2, Rules of Criminal Procedure. Petitioner never raised these claims in his prior appeals or petitions for

---

4. Corroborating circumstances indicating trustworthiness to support admission of this evidence as a statement against interest under Rule 804(b)(3), Rules of Evidence, are totally absent here. The affidavit is simply incredible. See Fisher, supra, at 141 Ariz. 276, 251.

5. Petitioner's reply adds an affidavit from Detective Quaife. He claims the State improperly withheld information that Detective Quaife had regarding Dunbar's activities as an informant. This is not newly-discovered evidence as Detective Quaife testified at trial in 1978 and has been available to petitioner's attorneys since that time. This is no showing of any diligence. Again, this is impeachment evidence and would not have changed the outcome. State v. Bilke, supra, 162 Ariz. at 52-53. Lastly, there is absolutely no showing of any discovery violation. Rules of Criminal Procedure, Rule 15.1.

6. He subsequently explained the reasons for the letters when he testified about his false recantation.

7. See Brady v. Maryland, 373 U.S. 83 (1963).

post-conviction relief.[8] No meritorious reasons are presented for not raising the claims previously. Rule 32.2(b), Rules of Criminal Procedure. Petitioner contends that the opinions offered here constitute newly-discovered evidence. A careful review of the affidavits and other exhibits do not support the cliam of newly-discovered evidence. All the materials used by petitioner's most recent experts were available or used by the mental health experts who examined petitioner in 1978. Therefore, petitioner is simply trying to impeach the findings of competency made in 1978. Petitioner also fails to show any diligence in bringing these matters to the court's attention. The new opinions, obtained fifteen years after the fact, do not change the historical facts of the prior finding of competency. They are not newly-discovered evidence. State v. Bilke, supra; see also Thomas v. Wainwright, supra. Consequently, these two claims are precluded and do not amount to newly-discovered material facts.

5. Petitioner's fifth claim is that the trial court wrongly found petitioner's prior conviction for aggravated battery, former A.R.S. § 13-542(e)(2), to be an aggravating factor in imposing the death penalty. This is the first time this claim has been raised.[9] No meritorious reasons are given for not raising this

---

8. Moreover, petitioner was examined prior to his first sentencing by three mental health experts. All three found petitioner competent to be sentenced. One expert found petitioner both competent to be sentenced and competent to stand trial. No other requests to have petitioner examined as to his competency have been filed in the intervening sixteen years. "(O)nce the issue of competency to stand trial is raised and the state court takes the proper steps to resolve the issue, the defendant is [not] free to drop the issue or later pick it up as it suits his purposes." Thomas v. Wainwright, 788 F.2d 684, 688 (11th Cir. 1986). Additionally, petitioner shows no sufficient reason for the failure to raise these issues in his previous petitions. Accordingly, these claims are precluded. Id.

9. In the appeal of his resentencing the court stated the following:

> The trial court found the following aggravating circumstances: Carriger "was previously convicted of a felony in the United States including the use or threat of violence on another person," A.R.S. § 13-703(F)(2); the murder was committed "in an especially heinous, cruel or depraved manner," id. at (6); and the

(continued...)

issue in petitioner's prior appeals and petitions for post-conviction relief. Rule 32.2(b), Rules of Criminal Procedure. Therefore, this issue is precluded. Rule 32.2(a), Rules of Criminal Procedure. Additionally, petitioner's bald claim that all his prior attorneys were ineffective for not raising this issue is meritless. Petitioner's failure to raise this issue earlier precludes the claim that his prior attorneys were ineffective. Rule 32.4(a), Rules of Criminal Procedure. That rule states in part

> [a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f) or (g).

This claim does not fall within any ofd the above exceptions. Further, petitioner does not set forth any meritorious reasons why these claims of ineffective assistance of counsel were not raised previously. Rule 32.2(b), Rules of Criminal Procedure. See also, footnote 10, infra.

Finally, In Arizona,

> [t]o establish an ineffective assistance of counsel claim [* * *], a convicted defendant must prove that (1) counsel lacked minimal competence as determined by prevailing professional norms, State v. Nash, 143 Ariz. 392, 397, 694 P.2d 222, 227, cert. denied, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed. 2d 706 (1985); and that (2) counsel's deficient performance prejudiced the defense. State v. Lee, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984). Accord Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court need not approach the inquiry in a specific order or address both prongs of the inquiry if the defendant makes an

---

(...continued)

> offense was committed in expectation "of anything of pecuniary value," id. at (5). Carriger does not challenge the first aggravating circumstance.

State v. Carriger, supra, 143 Ariz. at 160. (Emphasis added). Thus, this issue has been waived at trial, on appeal, and in a previous collateral proceeding. Rule 32.2(a), Rules of Criminal Procedure.

insufficient showing on either one. State v. Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

State v. Carver, 160 Ariz. 167, 174-175, 771 P.2d 1382 (1989). Here, petitioner cannot meet either criteria. Aggravated battery committed in violation of former A.R.S. § 13-542(e)(2), involved the use or threat of violence on another person. Battery was a necessary element of the offense. Battery was defined as the "wilful and unlawful use of force or violance upon the person of another." Former A.R.S. § 13-245(A). Thus, petitioner cannot show that his prior attorneys lacked minimal competence as determined by prevailing professional norms or their alleged deficient performance prejudiced him. Therefore, the claim of ineffective assistance of prior counsel is precluded and meritless.

6. Petitioner next argues that his 1967 convicton for an offense in involving the use or threat of violence is invalid because he was insane when committed that offense. This claim is clearly precluded. Rules 32.2 and 32.4(a), Rules of Crijminal Procedure. Petitioner gives no meritorious reasons why this claim was not raised previously.[10] Rule 32.2(b), Rules of

---

10. Petitioner's attempt to avoid preclusion by claiming all his prior attorneys were ineffective is meritless. First, this is petitioner's third petition for post-conviction relief. Therefore, this claim is precluded. Rule 32.4(a), Rules of Criminal Procedure. Secondly, he fails to present any meritorious reasons why these claims of ineffective assistance of counsel were not raised earlier. Rule 32.2(b), Rules of Criminal Procedure. The argument that these attorney s represented him in prior proceedings under this rule does not excuse the failure to raise the issue earlier. Rule 32.4(a), Rules of Criminal Procedure; see also State v. Armstrong, ___ Ariz. ___, 862 P.2d 230, 234-35 (App. 1993):

> "There is no constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2566 (1991). This is true even though there exists a state-created right to counsel on post-conviction proceedings after exhaustion of the appellate process. Pennsylvania v. Finley, 481 U.S. 551 (1987).

(continued...)

Criminal Procedure. Finally, petitioner cannot use this proceeding to attack the validity of the prior conviction. See Johnson v. Mississippi, 486 U.S. 578, 587-88 (1988); State ex rel. Collins v. Superior Court, 157 Ariz. 71, 75-76, 754 P.2d 1346 (1988).

7. Petitioner's seventh claim is also precluded. This claim contends that the sentencing judge received ex parte information before sentencing petitioner to death. This issue cannot be raised in this third petition for post-conviction relief. Rules 32.2 and 32.4(a), Rules of Criminal Procedure. Similarly, claims of ineffective assistance of counsel with respect to this issue are also precluded. See footnote 10, supra.
8. Petitioner's last claim is that he received ineffective assistance of counsel at his 1982 sentencing. Again, this issue is precluded. Rules 32.2 and 32.4, Rules of Criminal Procedure. Ineffective assistance of counsel cannot be raised in a successive petition for post-conviction relief. Id. See also Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993); Coleman v. Thompson, 111 S.Ct. 2546 (1991); State v. Alford, 157 Ariz. 101, 754 P.2d 1376 (App. 1988); and State v. Stanley, 123 Ariz. 95, 597 P.2d 998 (App. 1979). Finally, petitioner requested the attorneys who represented him at the 1982 resentencing to represent him in his second petition for post-conviction relief. In that request he acknowledged he would not permitted to raise in future petitions

---

(...continued)

To permit otherwise, would allow a petitioner to keep the same attorneys until all avenues for relief were exhausted. Then he could file a new petition alleging his former attorneys were ineffective and that earlier implied waivers in previous collateral proceedings were not valid. If this were allowed, litigation would never end:

> Rule 32 is separate and apart from the right to appeal, . . . and it is not designed to afford a second appeal. . . . It is not intended to unnecessarily delay the renditions of justice or add a third day in court when fewer days are sufficient to do justice * * * In all cases, civil or criminal, there must be an end to litigation.

State v. Carriger, 143 Ariz. at 145. (Citations omitted).

claims not raised in that petition. Thus, this claim is clearly precluded.

9. Petitioner's petition raises no material issue of fact or law which would entitle him to relief under Rule 32 and no purpose would be served by any further proceedings.

APPENDIX G

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Received JUN 28 '94 Processed JUN 28'94

Clerk of Court Distr. Ct

Clerk of the Court

June 27, 1994 HON MICHAEL D. RYAN S. CUMMINGS

NO. CR 101609

STATE OF ARIZONA

vs

PARIS HOYT CARRIGER

Ass't. Atty. General
Joe Maziarz

Denise I. Young

Paris Hoyt Carriger
#29425
ASPC-Florence
P. O. Box 8600
Florence, AZ 95232

Appeals

Victim Witness Division

Petitioner's Motion for Rehearing was received by the court. The State's response, and Petitioner's reply were also received. The pleadings were reviewed along with the files.

The Motion for Rehearing is largely a repeat of the original Petition. All but one of Petitioner's claims are precluded. **Rule 32.2(a), Rules of**

Criminal Procedure, **17 A.R.S.** Petitioner presents no meritorious reasons why these claims were not raised previously.

Further the Campbell Affidavit does not constitute newly discovered evidence for the reasons previously stated. **See** minute entry, **4/11/94**.

Petitioner is correct that a second fingerprint was not discovered. Instead, it was established that the print was nearly two feet from the end of the tape. The impact of this evidence at any subsequent trial would be enormous.

Petitioner throughout these proceedings argued that Dunbar "framed" Petitioner. To support this argument, Petitioner claimed that all the physical evidence was tampered with or planted by Dunbar. A key argument was that Petitioner's print was on the **end** of the tape and therefore was either there accidentally or planted by Dunbar. The subsequent examination of William Morris establishes that the print is 21 ½ inches from the end of the tape. This evidence literally destroys Petitioner's argument that Dunbar somehow was able to manipulate all the physical evidence. Thus, whether there was only one print or two, is immaterial. Where the print was found would be crucial at any subsequent trial. And its placement nearly two feet from the end of the tape is devastating to the petitioner.

Nevertheless, these findings of Morris do not control the rulings here. Petitioner simply does not overcome preclusion nor meet the newly-discovered evidence standards. Therefore, the Motion must be denied. Accordingly,

IT IS ORDERED denying Petitioner's Motion for Rehearing.

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	Judith Allen, Clerk By s/A. Anna FILED
Plaintiff,	)	1988 May 17 PM 3:34
	)	No. CR-101609
vs.	)	
PARIS HOYT CARRIGER,	)	
Defendant,	)	

Phoenix, Arizona
December 11, 1987
10:43 a.m.

BEFORE: The Honorable MICHAEL D. RYAN, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON POST-CONVICTION RELIEF

APPEARANCES:

FOR THE PLAINTIFF:
Gerald R. Grant
Jessica Funkhouser
Assistant Attorneys General

FOR THE DEFENDANT:
Don Bayles, Jr.
Robert Hirsch
Attorneys at Law

FOR ROBERT DUNBAR:
Myrna Parker
Attorney at Law

(ORIGINAL)

CAROL R. BOWEN
Court Reporter

DISCOVERY AND CONFIDENTIAL MATERIAL

Phoenix, Arizona
December 11, 1987
10:43 a.m.

PROCEEDINGS

THE COURT: This is the State of Arizona vs. Paris Hoyt Carriger, CR 101609. This is the time set for the resumption of the evidentiary hearing for the petition for post conviction relief.

MR. GRANT: State's ready, Your Honor.

MR. HIRSH: Bob Hirsh and Don Bayles for Mr. Carriger who is present and ready.

MR. GRANT: Your Honor, I believe we discussed in chambers we are going to proceed with an offer of proof with testimony at this time. I have a number of witnesses, four I believe, I'd like to have sworn before we start if we could do that.

THE COURT: All right.

MR. GRANT: The witnesses are Steve Anderson and Russell Davey, Robert Tavernaro and Gail McDowell.

MR. HIRSH: Pardon me, Judge. I have got one more witness who is involved so I guess if we are going to be swearing witnesses -- this is Ellen Heine.

(Whereupon, five witnesses were duly sworn by the Clerk.)

THE COURT: All right. Mr. Grant, you may clear the record, what is occurring here.

MR. GRANT: As we discussed in chambers, Your Honor, shortly before we were scheduled to resume on November 20th in this case, I received information from Mr. Hirsh he intended to call a witness at that time that subsequently turned into two witnesses, who were going to testify that the fingerprint that was found on the tape that was binding the victim's hands in this case was not Mr. Carriger's.

As a result of that disclosure, I asked for and received a continuance so that we could investigate the matter and have some of our own witnesses look at it and make their own determination. That included the FBI, which defense counsel agreed would be a good idea to have look at it. The examinations have been completed by our witnesses, by the FBI. There have been interviews of the two defense witnesses, defense interviews of our witnesses.

This morning before we began, the defense informed us that they no longer intended to call their two witnesses, Mr. Depersis and Dave Brewer. Our position was that nevertheless we should be allowed to present our witnesses which also included another witness who is not strictly a fingerprint witness. His name is Bill Morris. He is from DPS, and he did some examinations on the tape that was used to bind the victim's hands.

Essentially, if I can summarize, the Courts's ruling was that we weren't going to be allowed to present it as evidence, but we would be allowed to make an offer of proof through the testimony of the witnesses. That's what we intend to do, Your Honor.

MR. HIRSH: May I make two corrections, two things. I told Mr. Grant in Court that I had understood that the identification itself was bad, was a bad one, but what I was informed of by people who examined it, that latent was not susceptible to ID.

Secondly, I understand that Mr. Grant advised yesterday that we had no intention -- he was advised yesterday that we had no intention to pursue these issues.

MR. GRANT: I will agree with that.

THE COURT: The reason I am sustaining the defense's objection to calling these witnesses to present evidence is because since the defense has abandoned their challenge to the fingerprint testimony, that I don't think it's relevant for you to present evidence, but you want to make an offer of proof to show what the evidence would be if the Court were to allow that.

MR. GRANT: One other -- the first witness I'd like to call would be Mr. Russell Davey from the FBI. I would like to request that Bob Tavernaro, who was just sworn in, be allowed to sit at counsel table as an investigator on this fingerprint issue.

THE COURT: All right. Let's expedite this as much as we can, Mr. Grant.

MR. GRANT: It will just be a second to get some exhibits together here, Your Honor.

RUSSELL B. DAVEY,

called as a witness herein, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRANT:

Q. Could you tell us your name, please.

A. My name is Russell B. Davey. That's D-a-v-e-y.

Q. Who do you work for?

A. Federal Bureau of Investigation in Washington, DC.

Q. Do you have a title or --

A. My job title is fingerprint specialist.

Q. And what do your duties involve?

A. I examine items of evidence that are submitted to the FBI's latent fingerprint section to see if latent prints are on these items or can be developed through the use of fingerprint powders or chemicals. I have the prints of value photographed. I compare them with fingerprints of individuals, make reports, testify. I train new FBI agents and police officers throughout the country in the skills of latent print work and as a member of the FBI disaster squad. I go to scenes of disasters such as plane crashes and fires, etcetera, to identify the victims through fingerprint identification.

Q. I believe you said you are located in Washington, D.C.

A. Yes.

Q. Could you give us a brief summary of your experience in the area of fingerprints?

A. Well, I worked for the FBI 28 years, all of it in the identification division, which is the division which deals with fingerprint work. The first nine years was in the inked fingerprint file searching and comparing inked fingerprints against ink fingerprints for purposes of making identifications to determine if people had prior records, and then I moved into the latent print section which deals with latent prints, prints which are from crime scenes and compare those prints with the ink prints of persons that are named for comparison.

Q. Can you give us just a brief explanation of how you came to be involved in this case?

A. I received a letter from the Department of Public Safety of the State of Arizona and was asked to do comparisons of a latent print with the inked fingerprints of two individuals, and I made a report after I did those comparisons.

Q. Did you receive any other information about the case in that letter?

A. No.

Q. I want to show you a number of exhibits here as soon as I gather them forward and I will bring them up to you. I'd like to have you look at Exhibits 43, 44, 46, 48, 49, 50, 51, and 52, if you would. Would you take a look at those for me.

A. Yes, I have seen all of these items.

Q. Do you recognize each one of those?

A. Yes.

Q. Are those the exhibits you received?

A. Yes, they are.

Q. Or the things you received from the Department of Public Safety?

A. Yes.

Q. Can you give us just a brief description of what each one is, please, referring to the number if you would.

A. Yes, I will. Exhibit No. 43 is a lift card stating that it bears a piece of surgical tape and it has been powdered. A latent print is present in a portion of that tape and that's Exhibit 43. And Exhibit 48 and 82 --

Q. I believe there should be a --

A. Oh, excuse me, the green numbers are what we're talking about.

Q. Yes, yes.

A. 48 and 49 are photographs of this same card, and Exhibit 44 is two negatives, photographic negatives, of a picture of this card that is Exhibit 43. Exhibit 52 is a fingerprint card bearing the name of Robert Dunbar, and Exhibits 50 and 51 are two fingerprint cards bearing the name of Paris Carriger.

Now, Exhibit No. 46 is two enlarged photographs, and they are marked with ridge characteristics and one is labeled ink and the other is labeled latent and it corresponds with the prints that is present on the card, Exhibit 43 and the print that is present on a fingerprint card, which is Exhibit 50.

Q. Have you finished going through each of those?

A. Yes, I have.

MR. GRANT: Your Honor, if I could, just for clarification, all of those except for 44 were trial exhibits that had been renumbered for purposes of this hearing.

THE COURT: All right.

MR. GRANT: And I'd move for their introduction at this time.

MR. BAYLESS: Your Honor, for the record purposes, we don't object but I think if this is an offer of proof, they don't come in as exhibits for the purposes of the hearing substantive.

THE COURT: Right. They only come in for the offer of proof, so for that limited purpose, they are admitted.

Q. BY MR. GRANT: All right. Can you tell us how you began your work in this case once you received those items from the Department of Public Safety?

A. Well, the request was to compare the latent print that is present on the piece of tape and in the photographs and in the negatives with the ink prints of two people, Paris Carriger and Robert Dunbar, and I did compare those prints. I started with Dunbar and didn't find anything. I went to Paris Carriger and I did locate that print.

Q. When you examined the card with Dunbar's prints on it, could you tell me what number that is, please?

A. That's State's Exhibit 52.

Q. When you examined 52, did you go through each of the ten fingers and make a comparison with the latent?

A. Yes, I did.

Q. What were your conclusions?

A. That it was not his print.

Q. You then went to 53, is it, the print of Carriger?

A. 50.

Q. 50? You then did a comparison on each of the fingers on that card; is that correct?

A. Yes.

Q. What were your conclusions that you reached?

A. That it was a print made by the right thumb impression appearing on the card bearing the name of Paris Carriger which is State's Exhibit 50.

Q. I'd like to show you what's been marked as Exhibit No. 40 for purpose of the offer of proof here. Do you recognize that exhibit?

A. Yes, I do

Q. Can you tell us what it is?

A. This is a fingerprint card from Washington that I brought with me and it bears the name Paris Hoyt Carriger.

Q. Is that somehow different from the exhibit with Mr. Carriger's fingerprints on it that you received from DPS?

A. It's different only in the quality of the prints that are recorded. It is the same individual's prints.

Q. Is that -- is Exhibit 40 an inked impression of Mr. Carriger taken at a different time of the impression given to you by the Department of Public Safety?

A. Yes, it is.

Q. And did you compare Exhibit 40 with the two fingerprint cards you received from DPS?

A. Yes, I did.

Q. What was your conclusion?

A. Those are the prints of the same individual.

Q. Why did you use Exhibit 40 rather than the DPS card?

A. To prepare a display item for Court today and the quality of the print on Exhibit 40, the ink print, is better and would make a better display item so I used it.

Q. I believe you have your display item right here; is that correct?

A. Yes.

MR. GRANT: I didn't have this marked. I apologize for that. If I could have this marked, please.

BY MR. GRANT: I'd like to show you what's been marked Exhibit 53 for purposes of this hearing. Would you take a look at that and tell me if you recognize what that is.

A. Yes. Exhibit 53 is a photographic enlargement of a latent print in the corresponding area -- of the corresponding area of the right thumb impression on Exhibit 40.

Q. That's the chart that you, yourself, prepared; is that correct?

A. Yes, it is.

Q. Let me go back to the actual latent itself that you had that you received from DPS. Could you tell me if there was anything particularly unusual about the latent?

A. The latent print which is present on a piece of tape which is on this card, it's indicated as surgical tape, the latent print itself is in reverse color. By that I mean the ridges are white and the spaces are the furroughs in between the -- or the spaces in between the ridges are black. Usually when this happens, it's because extreme pressure has squeezed the perspiration off the ridges and into the valleys or furroughs in between the ridges and when the finger is taken away, the perspiration then is in the position where the furroughs are and powders later on adhere to that and you have a black print where you would normally have the white spaces of the furroughs.

To correct this, a photographic negative is prepared by placing an unexposed piece of film next to a picture of the latent print and light is shined through the original negative onto this new sheet of film. Now, the new sheet of film was exposed. Where the original negative was black, the new one will be white and vice versa. Where it was white, it will be black on the new negative. When the new negative is printed, the ridge color is changed on the correct position.

Q. Did you make that correction when you prepared your charts in this case?

A. Yes.

Q. So that the latent print that appears -- I believe it's Exhibit

A. The latent print's on 53.

Q. On your chart

A. Oh, yes.

Q. Is that 53?

A. Yes. The chart is 53. The latent print portion of it is from this reverse color negative that I mentioned.

Q. So that on your chart now ridges appear black?

A. Yes.

Q. And the furroughs appear white?

A. Yes.

Q. Can you tell us what you did then to arrive at your ultimate conclusion, what steps you took?

A. Well, after this was completed and this reversal was completed in actual size photographs, I compared the latent prints with the ink prints. As I mentioned before, I did the one individual Dunbar and then I did Carriger, so when I found points that began to align, I studied the prints and determined there was indeed sufficient number of points to make an identification and so I made that identification.

Q. Which fingerprint did you identify of Mr. Carriger's?

A. It's the right thumb impression.

Q. How many points did you find

A. I have ten marked.

Q. Could you demonstrate for us on your chart, Exhibit No. 53, the points you found and go through them individually.

A. Yes, I can.

MR. GRANT: Your Honor, I don't know if you would like to see him go through it point by point or not.

THE COURT: I have heard a lot of fingerprint experts, and I don't think it's necessary. It speaks for itself.

Q. BY MR. GRANT: All right, you found ten points that --

A. Yes, sir.

Q. And can you explain what you mean by points?

A. Well, the ridges on the points are not continuous lines. They end, divide, sometimes dividing and extending for a short distance as two ridges form an enclosure when they come back together. There is another ridge which is very small. It looks like a period, and it's called a dot.

Now, these ridge characteristics, the endings, the divides, bifurcations of dots, are compared, one print to another, to see if they are the same ridge characteristics and that, most important, they lie in the same relative position to one another in both prints; and when this is determined, that both prints in question have the same ridge characteristics and they lie in the same relative position to one another, then it's determined that both prints were made by the same finger and not by any other.

Q. Is there a set number of points that is required before an identification can be made?

A. No. There is no legal ruling as to the minimum number of points nor is there any administrative ruling where I work. Generally speaking, eight to twelve points is pretty good. Over that, it's very easy identification.

Q. Does the FBI have a policy with respect to identifications made on less than 12 points?

A. Well, our policy as far as identification that's made is verified by second examiner and this is not only for -- well, quality control, of course, but because a lot of times the original examiner is not available to testify and a second person would be available to come.

Q. Did that occur in this case.

A. Yes. All identifications are verified. And then each time you go out to testify, the section supervisor reviews the chart so that, in effect, makes three persons agreeing with the identification.

Q. Did a section supervisor perform that task in this case?

A. Yes, he did.

Q. Do you have any doubts in your own mind about your identification you have made here?

A. None whatsoever.

MR. GRANT: Could I have just a minute please, Your Honor.

(Whereupon a discussion was held off the record.)

MR. GRANT: No further questions, Your Honor.

THE COURT: All right. Any questions?

MR. BAYLES: Just very briefly.

CROSS-EXAMINATION

BY MR. BAYLES:

Q. Mr. Davey, can you tell us any way at all that your testimony is different from the State's testimony from Sally Jones in 1978?

A. I have no idea what her testimony was. I'm not familiar with that.

Q. And you were asked to confirm a latent found on the piece of tape; is that correct, sir?

A. I was asked to do a comparison, yes.

Q. There was also in this case a latent found on some jewelry in a box. Were you asked to confirm that latent, sir?

A. No, I was only asked to do this.

Q. Just this one?

MR. BAYLES: That's all I have.

THE COURT: Thank you. Anything further.

MR. GRANT: Your Honor, I have no additional questions. I didn't move for any of those exhibits to be admitted for purposes of this hearing. I'd like to do it and I have one other thing I'd like to bring up before we let Mr. Davey go.

THE COURT: All right. What's that?

MR. GRANT: That is the exhibit. Could you give me the number on that one please?

THE WITNESS: Forty.

MR. GRANT: If we could have that photographed and replaced so that Mr. Davey could take that back to the FBI's original files which is where it came from.

THE COURT: Any objection?

MR. BAYLES: No, sir.

THE COURT: All right. You will have to make arrangements for that to be done. The only other exhibit that you haven't moved in was the chart.

MR. GRANT: I'd move 53, then, for purposes of this hearing and I have no further questions of Mr. Davey.

THE COURT: All right. You may step down.

MR. BAYLES: Your Honor, for purposes of the hearing, we object. For purposes of offer of proof, we don't object.

THE COURT: I'm sorry, what was that?

MR. BAYLES: With respect to the admission of the exhibits for the Rule 32 hearing, we do object. For the offer of proof, we don't.

THE COURT: The objection is sustained as to the proceedings itself. As to the offer of proof, these items are admitted for that limited purpose.

MR. GRANT: All right. Could I have just a second, Your Honor

THE COURT: Yes.

MR. GRANT: The next witness I'd like to call would be Steve Anderson, Your Honor.

THE COURT: All right.

MR. GRANT: I believe Mr. Tavernaro is bringing him in.

THE COURT: Would you hand my Clerk the exhibits.

MR. GRANT: I am sorry. Can we keep some of them here.

THE COURT: She needs to mark them.

MR. GRANT: Oh, sorry.

You have already been sworn, I believe.

THE COURT: All right.

MR. GRANT: Thank you.

STEVEN ANDERSON,

called as a witness herein, having been previously duly sworn, was examined and testified as follows:

BY MR. GRANT:

Q. Please tell us your name, please.

A. Steven Anderson.

Q. What do you do for a living?

A. I'm the supervising latent examiner for the Arizona Department of Public Safety.

Q. Could you tell us what your duties involve?

A. Collection, preservation and identification of latent fingerprint impressions as well as supervision of latent printing.

Q. Could you give us a brief summary of your experience in the field of latent fingerprint identification?

A. I have been employed by the Arizona Department of Public Safety since 1980. Previous to that I was employed by the Phoenix Police Department from 1975 until 1980.

Q. Have you been qualified as an expert in fingerprint identification in Court cases in this State?

A. In this county approximately three dozen, and I have also testified in Pinal, Pima, Yuma, Mohave, Navajo and Gila Counties.

Q. I'd like to take you back to 1978. Could you tell us where you were working at that time?

A. Phoenix Police Department.

Q. Okay. Specifically in March of 1978, could you tell us what your duties were?

A. I was a police identification technician with the Phoenix Police Department. My duties at that time were also to collect, preserve and identify latent fingerprint evidence as well as photograph crime scenes and do other related duties.

Q. Okay. To speed things up a little bit, you actually testified in the trial of this matter back in 1978, correct?

A. Yes, sir, I did.

Q. And you were the person who went to the scene of the Shaw Jewelry Store and processed it for fingerprints and took photographs, correct?

A. Yes, sir.

Q. And you also were the persons, I believe -- on March 16th, 1978, you were presented with a wad of tape from one of the detectives in the case; is that correct?

A. Yes, sir.

Q. I'd like to show you what's been marked for exhibit -- I mean for -- excuse me, for purposes of this hearing or offer of proof as Exhibit No. 45. Do you recognize that?

A. Yes, sir. That is a photograph I took at that scene

Q. Could you tell us what that depicts, please?

A. That depicts the tape that was wrapped around the hands --

Q. Of the victim?

A. Yes, sir

MR. GRANT: Your Honor, for purpose of the offer of proof, I'd move its admission.

THE COURT: All right. It's admitted for the limited purposes of the offer of proof.

Q. BY MR. GRANT: When you were presented -- on March 16th, 1978, you were presented with that tape; is that correct?

A. Yes, sir, approximately around that time.

Q. Was there any difference between the tape as it appears in that photograph and as it was presented to you on that date?

A. Yes, sir. It had been cut off the victim's hands.

Q. What did you do with the tape when you received it?

A. I processed it for any identifiable latent impressions that may be present on it.

Q. I'd like to show you what's been marked as Exhibit 42 for purposes of the offer of proof and ask you if you recognize that.

A. Yes, sir. This bucket contains the tape that I processed for latent -- for any identifiable latent impressions.

MR. GRANT: Your Honor, I believe both of those exhibits were also trial exhibits, just for purpose of the record, and I'd move for the second one to be admitted in evidence for purposes of the offer of proof.

THE COURT: It is admitted for the purposes -- limited purposes for the offer of proof.

Q. BY MR. GRANT: Can you tell us what exactly you did with the tape on March 16th, 1978?

A. Yes, sir. I used black powder and magnum brush to identify any identifiable latent impressions that might be present on it and I did develop one.

Q. Where did you apply the powder to the tape?

A. I applied the powder to the nonsticky side of the tape.

Q. So in other words, the exterior surface of the tape wad that was presented to you?

A. Yes, sir.

Q. Did you put any on the interior surface?

A. No, sir, I don't believe that I did.

Q. Are you able to tell us on exhibit -- the photograph there -- I don't believe -- I don't have the number in front of me. Could you tell me the number, please.

A. No. 11 and No. 45.

Q. Okay. 45 on the green tag?

A. Yes, sir.

Q. Are you able to tell us on Exhibit 45 what -- looking at the tape that is shown there, where on the tape you found the latent?

A. No, sir, I am not.

Q. Can you tell us what you did once you found that latent.

A. Once I found the latent, I removed a piece of tape that the latent was on, photographed it and preserved it by putting it on a latent life card and covering it with tape.

MR. GRANT: Could I have just a moment, please, Your Honor.

Q. BY MR. GRANT: You said you cut the latent away from the tape, is that correct?

A. I cut the tape that -- the latent was contained on an impression of the tape. I cut that away.

Q. Do you recall if you cut both ends in order to remove it from the wad of tape?

A. No, sir, I don't remember if I cut both ends or just one end.

Q. I'd like to show you what has been marked for purposes of this offer of proof as Exhibits 43, 48 and 49. Would you take a look at those for me, please.

A. 48 and 49 are photographs of latent impressions on the tape. 43 is the piece of tape containing the latent impression.

Q. When did you take the photographs, 48 and 49?

A. At the time that I processed this tape for identifiable latent impressions and after I had developed one.

MR. GRANT: Your Honor, I'd move for those three exhibits, 43, 48 and 49 for purposes of the offer of proof.

THE COURT: All right. They will be admitted for the limited purposes of the offer of proof.

Q. BY MR. GRANT: When you cut 43 away from the wad of tape, was there additional tape underneath 43?

A. Yes, sir; as I recall, there was.

Q. And you -- I already asked you that you testified at trial in 1978, correct?

A. Yes, sir.

Q. You didn't testify as to a fingerprint identification, however, correct?

A. No, sir, I testified to my part in developing the latent impression

Q. Who actually did the identification back in 1978?

A. Sally Jones.

Q. Did you have any further involvement in this case following the trial up until recently?

A. No, sir.

Q. Okay. Could you tell us how you became recently re-involved in this case?

A. Yes, sir. You called my --

Q. Could you tell us what the purpose of the call was, what was stated in the conversation?

A. To review the latent lift that I had processed and the identification made by Sally at the time also.

Q. What did you do as a result of my call?

A. I reviewed the evidence, the latent lifted and the identification that Sally Jones originally made.

Q. Where did that take place?

A. It took place at the Department of Public Safety at North 20th Avenue.

Q. Let me take you a a step back. Did you make a review before that?

A. I'm sorry, sir, a review prior to the time you called me?

Q. No, prior to the time you reviewed it at the Department of Public Safety.

A. Yes, sir, I had seen the materials at the Phoenix Police Department.

Q. Did you make a review in between the time I called you and in between the time you made a review at the Department of Public Safety? Did you look at the exhibits?

A. No, sir. The only time I saw those exhibits were prior to the trial I testified on in 1978.

Q. Do you recall looking at the exhibits in the jury room in this courtroom before you took them to the Department of Public Safety?

A. Yes, sir, I did.

Q. Okay. Could you explain to us how that came about?

A. Yes, sir. I looked at them at your request. I came in and reviewed the charts that were illustrative aids of the identification prepared by Sally Jones as well as the tape itself, the latent lift and the photographs.

Q. Why did you wish to make further comparison at the Department of Public Safety?

A. Any time I compare a latent print identification or am asked to do one, I do it objectively and compare it as if it had not been done before.

Q. Did you feel that you needed further time to make the comparison other than what you did in the jury room?

A. Yes, sir, I did.

Q. Let me show you some additional exhibits that I believe have already been admitted for purposes of the offer, 44, 50, 51, 52 and 46. Do you recognize those?

A. 44 is negatives of the latent print of 48; and 49, that I obtained from the Phoenix Police Department. And the rest of the exhibits I do recognize as having viewed in the jury room and later on at DPS.

Q. Why did you obtain those negatives, number 44, I believe?

A. In order to make enlargements of the latent impression.

Q. For purposes of your own independent comparison.

A. Yes, sir.

Q. About how long did you spend on your comparison?

A. Personally approximately about 15 hours, sir.

Q. Can you tell us what conclusions you reached?

A. Yes, sir. The latent impression contained in Exhibit 43 contains the right thumb of Paris Hoyt Carriger.

Q. Is there any doubt in your mind about that identification?

A. No, sir, there is no question.

Q. I'd like to take you back to one more point that I already covered but I neglected to ask you a couple of questions. When you took the latent off the wad of tape, did you unravel the tape at that time?

A. No, sir. I did not.

Q. Did you make any efforts to determine the location of the latent on the wad of tape that the --

A. No, sir, I did not.

Q. Did you find any problem with respect to the actual latent itself when you were making your comparison?

A. No, sir.

Q. Do you recall whether or not there was a color reversal in that latent?

A. Yes, sir, there was.

Q. Did the negatives, number 44, help you in dealing with the problem of a color reversal?

A. Yes, sir, they did.

Q. How did you use them to deal with the problem?

A. In doing a color reversal, having the negative and being able to put it on a light table and turn the light on and photograph it that way enabled me to color reverse it and see it black on black and instead of white on black.

MR. GRANT: I have no other questions, Your Honor.

THE COURT: Counsel.

MR. BAYLES: Just a few.

CROSS-EXAMINATION

BY MR. BAYLES:

Q. Mr. Anderson, who was it that presented this tape to you in 1978?

A. I don't recall, but I believe it was one of the homicide detectives, sir.

Q. Where did you receive it?

A. I received it at the Phoenix Police Department in the information bureau.

Q. So somebody whose identity you don't remember brought the tape to you and you never saw it on the victim's hands; is that correct, sir?

A. No, sir. I saw it on the victim's hands at the scene. After I left the scene, I didn't see it until it was received by me to be processed.

Q. You cut the latent from the tape; is that correct, sir?

A. I cut this particular lift from the tape, the wad of tape itself.

Q. Do you recall if you cut once or twice?

A. No, sir, I don't recall if I cut once or twice on it.

Q. Did you photograph the tape at that time so that you could determine just where it was that that latent came from?

A. Sir, at the point in time that I received it for processing, it had already been cut off the victim's hands and I had no way of determining in what form it was before it was cut or how.

Q. But the latent was still on the wad when you got it; is that correct, sir?

A. Yes, sir.

Q. And you separated the latent from the wad; is that also true?

A. Yes, sir.

Q. And if you photographed it, we could know exactly where that latent was with respect to the wad. Would that be true?

A. As far as relation to the wad, sir?

Q. Yes, sir.

A. You mean before I processed it?

Q. Before you took it off.

A. No, sir, because it had already been cut. There was no way that I felt I could determine the location of it and I was not asked to. I was just asked to process it for latent prints.

Q. You say it had already been cut when you received it?

A. Yes, sir.

Q. So you didn't cut it.

A. No, sir.

Q. Who did the cutting?

A. I don't know, sir. I believe it was someone at the medical examiner's office.

Q. Can you tell us how we could find out who did the cutting, who took that print from the wad, sir?

A. You mean who cut the tape off of the victim's hands?

Q. How the latent was removed from the wad, where the latent was on the wad, who did it. Can you tell us how we can establish those facts, sir?

A. Yes, sir; I believe that was established by Bill Morris.

Q. You're talking about last month?

A. Yes, sir.

Q. But as far as who actually took the wad or the latent from the wad in 1978, we don't know that; is that true, sir?

A. No, sir. I don't know who cut the tape off the victim's hands. All I did was process it for identifiable latent impressions at that time.

Q. In fact in 1978 you were asked if you could determine, from your involvement with the tape, where on the tape roll the latent existed, weren't you, sir?

A. I was asked that question, yes, sir.

Q. And you testified at trial in 1978 that you had no way of knowing that fact. Is that true, sir?

A. That is correct because I had not been asked if I could do it to begin with. Again, I was just merely asked to process it for identifiable latent impressions.

Q. And we know that somebody whose identify is unknown cut the latent from the wad, correct?

A. No, sir. I cut this latent lift containing this latent impression, this piece of tape, from the wad of tape.

Q. So it wasn't already cut from the wad when you got it?

A. No, sir. It was not cut from the wad when I got it. The tape, owever, had been cut from the victim's hands when I got it.

Q. Well, that goes back to the question I was asking you a minute ago, sir. Did you photograph the latent as it existed on the wad prior to the time you removed it from the wad?

A. No, sir.

Q. Well, if you had done that, we could have seen exactly where on the wad the latent existed, couldn't we, sir.

A. I don't know that, sir. Again, it was cut before I received it.

Q. Well, it was cut off the victim's hands, is that what you're saying?

A. Yes, sir.

Q. But as far as the latent being removed from the wad, that's something that you and only you did; is that true, Mr. Anderson?

A. That is correct.

Q. And what you can testify to with certainty is that the latent does st right next to one of the ends of the tape; is that true, sir?

A. No, sir.

Q. Well?

A. I don't recall if I cut it from one end or both and I don't recall where it was as far as position on the tape. Again, I was not asked to determine that. I was only asked to process it for latent impressions.

Q. You didn't lay the trips of tape out yourself, did you, in 1978?

A. No, sir. Again, I was not asked to.

Q. And with respect to the latent that you have, it is at the end of one of the segments of the tape; isn't that true, sir?

A. I don't know sir. You'd have to ask Bill Morris. He would know that.

Q. Well, do you recall being asked virtually the same question at the time this trial was before a jury in 1978, Mr. Anderson?

A. I was asked questions of the same nature, sir. That was nine years ago, and I don't remember the exact nature of the questions.

Q. And certainly when you testified in 1978, your recollection as to where the tape was with respect to the wad and other matters about which you have given testimony today was certainly fresher, wasn't it, sir?

A. Yes, sir, I believe it would have been.

Q. And didn't -- weren't you asked this question, sir, and didn't you give this answer, referring to the July 20th transcript, Page 317, referring to the latent, sir:

"So, it was right at the end of the piece of tape, is that correct?"

Your response: "Yes, sir."

A. Sir, may I read the question, please?

Q. Yeah. I have got it underlined for you, Mr. Anderson.

A. Thank you. Sir, what that is referring to is the cut and the question above it: "If you will notice on the cut, it is cut at an angle. All right, it is on the latent also so that possibly I could match it up with no problem."

"So, it was right at the end of the piece of tape, is that correct? "Yes, sir."

He is referring to the place that I cut the tape from.

Q. And the latent is right at this end of the piece of tape?

A. He's referring from where I cut it. Sir, I believe he's referring to where I cut the tape from.

Q. Well, weren't you also asked the question on Page 318, sir, Line 11: "Do I understand you are telling us that it is your opinion that the print is on the very end of the tape?

And what you said, sir, Answer: "The latent itself on the lift there is on the very edge of the tape."

That's what you told us, isn't it, Mr. Anderson?

A. Sir, I believe he is again referring to where I removed the latent from and I -- yes, I believe I could have matched it up then from where I cut it and nothing else.

Q. The latent exists right next to the cut; isn't this true, sir?

A. No, sir. I don't know where it exists as far as in relation to the cut. Again, I did not and was not asked to determine anything as far as position. I was merely asked to process it for identifying identifiable latent impressions. Mr. Morris determined that, and that's something you should ask him.

Q. Sir, who cut the other side of the tape, sir, in 1978?

A. The other side?

Q. You have got a segment of tape which is a few inches long there, sir, that you claim contains a latent. You cut one side of it. Can you tell us who cut the other side?

A. The other side?

Q. You have got a segment of tape which is a few inches long there, sir, that you claim contains a latent. You cut one side of it. Can you tell us who cut the other side?

A. Again, sir, I don't know if I cut both sides or not. I don't remember if I did or not. I may have.

Q. And you certainly didn't photograph that and didn't take notes; is that true, sir?

A. No, sir. I did not photograph it or take notes.

MR. BAYLES: That's all I have.

THE COURT: Thank you. Mr. Grant.

MR. GRANT: Just a few questions, Your Honor.

REDIRECT EXAMINATION

BY MR. GRANT:

Q. Let me see if I can go back over a few things. When the tape was presented to you on March 16th, I believe, 1978, it had been cut once, correct?

A. Yes.

Q. Am I correct?

A. Yes, sir.

Q. That cut was made so that the tape could be removed from the victim's hands, correct?

A. Yes, sir.

Q. And there was a second cut made; is that correct?

A. Yes, sir, by myself to remove the latent lift.

Q. And that cut was made to take off what we now have marked as Exhibit whatever the green number marked is on there, correct?

A. Yes, sir.

Q. And that's Exhibit 43, correct?

A. Yes, sir.

Q. Okay. So Exhibit 43 is an actual piece of the tape that came off the wad that was on the victim's hands, correct?

A. Yes, sir.

Q. Okay. Do you recall -- when you cut this back in 1978, do you recall making an effort to cut it in a manner so that you might be able to later match it up?

A. Yes, sir.

Q. Do you recall -- can you look at Exhibit 43 and tell me if you can recognize what you did to attempt to preserve it?

A. Yes, sir, it was cut at an angle in the end specifically so that if there was any question where it came from it could be lined up.

Q. There seem to be two angles on there, one coming from the -- and I am holding this with the number 43 on the bottom -- one coming from the lower right-hand end and going up and then another going towards the left at a direction to the top of the tape. Do you see both of those?

A. Yes, sir.

Q. Do you recall if you made both of those?

A. Yes, sir. As I recall, I believe that I did.

Q. Mr. Bayles asked you some questions about testimony you gave back in 1978 concerning the location of the latent on the tape. Do you recall him asking you that?

A. Oh, yes, sir.

Q. Okay. The answers -- what were the answers you gave back in '78?

A. As I recall, sir, I was asked where this piece of tape came from and I was able to show him where I had cut it from and nothing else because again, I was not asked to determine location or length or anything else. I was merely asked to process it for identifiable latent impressions.

Q. I believe Mr. Bayles read you some actual questions and answers from the trial where you stated the latent is at the end of the tape. Do you recall him reading you that?

A. Yes, sir.

Q. What are you referring to when you say the end of the tape there?

A. The latent impression is contained in this area at the end of the tape.

Q. Okay. You are talking about the ends of the piece of tape that's now marked Exhibit 43, correct?

A. Yes, sir.

Q. That's what you were talking about then?

A. As I recall, yes, sir.

Q. You weren't talking about the end of the entire wad of tape that was on the victim's hands, were you?

A. No, sir, I don't believe I was at all.

MR. GRANT: No other questions.

MR. BAYLES: Your Honor, I just have a couple of follow up.

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. BAYLES:

Q. You didn't know in 1978 if the latent was on the very edge of the tape; is that so?

A. No, sir, I had no idea as far as the position or where it was.

Q. And you certainly didn't exclude that possibility at that time. Is that true, sir?

A. No, sir, I made no opinion on any possibilities as far as where it was. Again, all I was asked to do is just process it for latent prints.

Q. When you pulled the print off there, was the tape laid out in front of you in 1978, sir?

A. No, sir, it was not.

Q. How did you pull the latent from the tape?

A. Again, I cut it with a pair of scissors on one end, at least, and I don't remember if I did both ends or not.

Q. Well, for dusting it, didn't you have to lay out parts of the tape, sir?

A. No, sir; not at that time.

Q. Was there anyone with you at that time, Mr. Anderson?

A. Yes, sir.

Q. Who was that?

A. Carl Richardson.

Q. He saw all of this then?

A. Yes, sir. He was with me.

MR. BAYLES: Thank you.

MR. GRANT: No other questions, Your Honor.

THE COURT: All right. Thank you. You may step down.

MR. GRANT: Our next witness will be Bill Morris, Your Honor.

WILLIAM H. MORRIS, JR.,

Called as a witness herein, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. FUNKHOUSER:

Q. Would you state your name, please.

A. William H. Morris, Jr.

Q. What is your occupation?

A. I am a supervising criminalist at the Arizona Department of Public Safety crime laboratory.

Q. How long have you been employed in that capacity?

A. Since September of 1972.

Q. Can you explain just briefly what's a criminalist?

A. A criminalist is a scientist who examines physical evidence and presents the results of his findings in courts of law.

Q. How long have you been employed in the field of criminalistics?

A. For 22 years now, ma'am.

Q. What college experience do you have and have you earned any degrees?

A. I have a Bachelor of Science degree in chemistry from St. Peter's College in Jersey City, New Jersey.

Q. What crime laboratories have you worked in prior to being employed by the Department of Public Safety?

A. From November of 1965 until November of 1968 I worked at the Army Crime Laboratory at Ft. Gordon, Georgia. From November of 1968 until November of 1969, I was the chief chemist at the Army's Crime Laboratory in Viet Nam. From January of 1970 until September of 1972 I was employed as a criminalist at the Phoenix Police Department's Crime Laboratory and I have been employed by the Department of Public Safety since September of 1972.

Q. Have you received any specialized training in criminalistics --

A. Yes, ma'am.

Q. -- since graduating from college?

A. Yes.

Q. Would you describe that for us?

A. I completed a six month on-the-job training program in forensic chemistry and criminalistics at the Army's Crime Laboratory in Ft. Gordon, Georgia. During this time I was trained in the examination of various types of physical evidence such as hairs, fibers, drugs, narcotics, physical matching, miscellaneous examinations. Since then I have attended numerous short schools and seminars. I have attended the FBI Academy. I have been trained under the staff of the FBI laboratories.

Q. Are you a member of any professional organizations?

A. Yes, ma'am, I am.

Q. Could you tell us what those are?

A. I am a member of the Association of Firearm and Tool Mark Examiners, the California Association of Criminalists and the Southwestern Association of Forensic Scientists.

Q. Do you have an area of specialization?

A. Yes, ma'am.

Q. And what would that be?

A. I work primarily in firearm and tool mark identifications.

Q. Have you done any teaching in the fields of criminalistics?

A. Yes, ma'am.

Q. Please tell us what that is.

A. I have taught criminalistics at a community college, Phoenix College, and I presently teach criminalistics at Glendale Community College.

Q. Are you the author of any publications in the area?

A. I have published two articles for the Association of Firearm and Tool Mark Journals and one for the Arizona Prosecuting Attorney's Association.

Q. Have you ever qualified as an expert to testify in courts in Arizona?

A. Yes, ma'am.

Q. Would you describe what court and approximately the number of times total that you have testified?

A. I have testified in U. S. District Courts in Arizona, superior courts in most of the counties of Arizona, municipal courts and justice courts.

Q. Approximately the number of times, sir?

A. Several hundred.

Q. Have you testified in other forums other than courts of Arizona?

A. Yes, ma'am.

Q. And please tell us what those are.

A. I have testified in general and special courts marshall for all the military services and I have testified in San Bernardino County Courts or Superior Courts.

Q. How did you become involved in this case?

A. I was brought some items of evidence by Steve Anderson of our latent fingerprints unit and he asked me to perform some examinations of that evidence.

Q. What type of examination did he ask you to perform?

A. He asked if I could determine whether a wad of tape could be matched to a roll of tape, that was one of the items of evidence, and also if we could determine at what position a segment of tape was along the length of the tape that composed this wad if, in fact, it had come from that length of tape.

Q. And at that time, did he give you any items?

A. Yes, ma'am.

Q. Okay, and the type of examination you were asked to perform, what's the technical term for that in the field of criminalistics?

A. We call that a physical matching examination.

Q. Is physical matching a recognized subdivision of the fields of criminalistics?

A. Yes, ma'am.

Q. Can you describe the degree of conclusiveness or the results of a physical match?

Q. Just in general.

A. If you can physically match two items together, that is the most conclusive type of examination there is.

Q. Can you briefly tell me why?

A. Because in performing a physical match, you are matching the individual characteristics of two items that were at one time one and the same piece to each other.

Q. Is the mathematical probability of that, or can you tell me how the mathematical probabilities of that compares just generally to, say, doing an ABO blood typing comparison?

A. The physical match is an absolute identification whereas the statistics associated with ABO typing don't allow you to determine that particular blood sample came from a particular individual to the exclusion of all other individuals. If you can successfully match two items by physical match, then you can say that those two items were at one time one and the same piece.

Q. Let me show you now what's been marked as Exhibits 41, 42 and 43 for examination and ask you if you recognize these items. Let's start with No. 41. First of all, do you recognize it?

A. Yes, ma'am, I do.

Q. How do you recognize it?

A. It has my initials on it. The writing, that I recognize and also has my initials on the seals that I placed on the item at the conclusion -- last time I looked at them.

Q. And when was that, sir?

A. The day before yesterday, ma'am.

Q. Okay, and the prior to that -- is this one of the items that Mr. Anderson gave to you to examine?

A. Yes, ma'am.

Q. And just for the record, what do you see there? What is that?

A. It's a partial roll of Johnson and Johnson adhesive tape and some paper toweling or paper napkins with red-brown stains on them.

Q. Let me show you Exhibit 42. Do you recognize this item?

A. Yes, ma'am. I do.

Q. And what does that appear to be?

A. It is a plastic container which contained the wad of tape at the time Mr. Anderson brought it to me.

Q. How do you recognize that today?

A. It has my initials, the other writings that I recognize and any initials on the seals that I placed on it.

Q. When was the last time you saw it?

A. The day before yesterday, ma'am.

Q. And prior to that, when did you see it?

A. When Mr. Anderson brought it to me on the 17th of November, 1987.

Q. Okay. With respect to Exhibit No. 43, do you recognize this, sir?

A. Yes, ma'am.

Q. And how do you recognize it?

A. It has my initials on it, other writings that I recognize.

Q. When was the last time you saw it?

A. The day before yesterday, ma'am.

Q. And prior to that, when did you see it?

A. When Mr. Anderson brought it to me on the 17th of November, 1987.

Q. Okay. With respect to Exhibit No. 43, do you recognize this, sir?

A. Yes, ma'am.

Q. And how do you recognize it?

A. It has my initials on it, other writings that I recognize.

Q. When was the last time you saw it?

A. Again, the day before yesterday, ma'am.

Q. And prior to that, had you seen it before?

A. Yes, ma'am.

Q. And under what circumstances?

A. When it was brought to me along with the other items by Mr. Anderson.

Q. Can you describe generally then -- well, let me ask you this first: Did you ever do anything with these items in particular?

A. Yes, ma'am.

Q. Can you describe generally for me and for the Court exactly what it was you did?

A. After receiving the items of evidence from Mr. Anderson, I inventoried them and described them in my notes in general as to what they were. I then removed the wad of tape from the plastic container and made some general examinations of it such as the color of the tape, the width of the tape and things like that.

I then looked at the tape on the roll of tape in this exhibit, again looked at the characteristics, the width of the tape, the type, color and the like.

Q. By this exhibit, you mean No. 41 for identification?

A. Yes, ma'am.

Q. Thank you. Go ahead, please.

A. I then took the end of the roll of tape and matched it to an area, a free end on one of the segments that made up the wad of tape from State's Exhibit 42.

Q. And by matching it, what do you mean specifically?

A. I fit together the regular edges much like you would a jigsaw puzzle or a broken plate or cup if you were trying to repair it.

Q. Did you reach any conclusions? Is the concept of a conclusion inherent when you say you made a match?

A. Yes, ma'am.

Q. Okay. So what did you conclude then?

A. My conclusion was that the piece of tape from the wad did, in fact, match with the piece of tape on the roll and that piece of tape and the piece of tape on the roll were at one time one and the same piece and that that piece of tape did, in fact, come from that roll.

Q. What did you do after that?

A. After that, we looked at the wad or I looked at the wad of tape in conjunction with the State's Exhibit 43 which is a piece of tape that was told to me to have a latent fingerprint on it. I was trying to determine if I could fit this piece of tape in or to determine at what point in this whole length of tape that made up the wad this latent fit.

I took the tape and I put it on Mr. Anderson's hands in as close a position as I could from some photographs I had of the victim whose hands were bound behind him with tape, then looked at the tape some more and at that point I concluded that I was going to have to remove the different segments of the tape or unroll this was in order to conclusively identify this segment along the length if I could, in fact, do that.

Q. What did you do prior to taking the wad apart?

A. After my examination, I made photographs of the wad in as close to the original condition as I received it.

Q. Let me show you what's been marked as State's Exhibit No. 54 for identification. Do you recognize that?

A. Yes, ma'am.

Q. And what is that?

A. It's one of the photographs I took of the wad before I started to remove the different pieces from it.

Q. And did that accurately depict what the wad looked like when you received it?

A. Yes, ma'am.

Q. Okay. After taking the photographs, what did you do?

A. After taking the photographs, I was certain that I had, in fact, produced some photographs. I then started to disassemble the wad by removing the pieces as best as I could and as carefully as I could so as not to damage any of the pieces of tape nor to damage the ends which we would have had to match back together.

Q. Let me clarify a couple of things. You took more than one photograph; is that correct?

A. Yes, ma'am.

Q. And is Exhibit 54 representative of those photographs?

A. That's one of the photographs, yes, ma'am.

Q. And when you say that you made sure you had some photographs, what precisely do you mean by that?

A. I took them to our photo lab and had them processed and when they were processed, and we could look at the negatives and see, in fact, that the pictures came out, then I was certain that I could proceed with my examination of the wad.

Q. Okay. When you started to disassemble the wad, did you have to use any solvents or anything of that nature?

A. No, ma'am.

Q. Did you use any liquids or anything like that?

A. No, ma'am.

Q. What did you do to disassemble the wad?

A. I just started removing the pieces of tape, the segments of tape as sort of the -- as they conveniently came up, I just removed them as carefully as I could so that I could put them out in their individual areas.

Q. Was there any significance in your mind, in your training and experience as a criminalist, to the order in which you removed those pieces of tape?

A. No, ma'am. I just removed them as conveniently as it was for me with always in mind that I didn't want to damage the tape or damage the ends of the tape.

Q. Did the order in which those pieces of tape were coming off the wad have any significance or assist you in any way in reassembling the tape into one long length of tape?

A. No, ma'am.

Q. Okay. Please describe what occurred next.

A. As I removed each segment of tape from the wad, I set it out on a work bench until I had all of the pieces of tape separated from the wad and laid out on my work bench. At this point, I then started reassembling the strip of tape by matching the edges and putting matching angles and putting segments in order.

Q. At this point, can you describe for us generally what principle of criminalistics and physical matching you applied to complete this task.

A. In a match like this, there are several things that you can look for to effect an identification or an exclusion. I have mentioned class characteristics which are the general characteristics that would be associated with a roll of tape -- the width, the type of material, the color. These things are common to all of this kind of tape made by this manufacturer.

If you notice a class characteristic difference, then you have to exclude these two pieces of tape as coming from the same source. If the class characteristics are the same, you then proceed to look for individual characteristics. Individual characteristics are the irregularly torn edges along the different segments of the tape. They are discolorations, defects or folds at the junctions which can then be used to match back if you take a word, for example, and cut a letter through it, you can match that piece of paper back by realigning the letters; things like that.

Q. At this point, could you remove from Exhibit No. 42 and also from Exhibit No. 41, the metal roll of tape and then the tape as you have reassembled it for us.

MS. FUNKHOUSER: Your Honor, for purposes of demonstration would you prefer that we roll this out on counsel's table or perhaps at your bench up here or not at all.

MR. BAYLES: Your Honor, if this is an offer of proof --

THE COURT: I think you can just do it through oral testimony. I don't think you really have to set it all out. Just have him testify.

MS. FUNKHOUSER: Perhaps it's not necessary for him to even remove the items.

THE COURT: No.

Q. BY MS. FUNKHOUSER: Then I will withdraw that request of you, Mr. Morris.

A. I have already opened State's Exhibit 41, ma'am, by cutting it, but I will just leave it here.

Q. Okay, and we will ask the clerk's office to reseal that at the appropriate time. Explain then -- describe for us just exactly what it is you did next.

A. After I laid the segments of tape out, after separating them from the wad, I just started matching them together along irregular edges and fitting them in. On some of the junctions, I used either a magnifier or a microscope to have a closer look at the edges and a closer look at any of the contaminants that went across the tear and finally got the different segments laid out in the original order that they were before they were torn from each other.

While I was doing this, I was able to fit the piece of tape containing the latent fingerprint in its appropriate place along the length of tape. After I did that and had it all laid out on the work bench, I measured the length that I had reassembled and then I measured the distance from the roll of tape -- the ends of the roll, to the area of the latent fingerprint match or the latent fingerprint segments.

I then made some diagrams of the area containing the latent fingerprints lifted and the last examination was to photograph the different junctions that I had made.

Q. These photographs are in your possession at this time?

A. Yes, ma'am.

Q. All right. Can you tell us how long the length of tape is approximately?

A. Approximately eight feet, nine inches.

Q. How many segments are there in that length of tape?

A. Twelve.

Q. Where is the segment in Exhibit 43, the latent lift segment of tape -- where does that occur from the end of the metal roll of tape contained in the plastic bag in Exhibit 41?

A. Approximately 21 and a half inches, ma'am.

Q. To what degree of certainty are you certain of this result? Did I ask a bad question? Is there any degree of certainty that you can state that you are confident in your conclusion that you have reassembled the entire roll?

A. I am certain that I have reassembled the segment of tape that was torn to make the wad, and I am certain that the latent fingerprint lift segment is in its appropriate place in relation to the length of tape and to the piece of tape on the ends of the roll of tape.

MS. FUNKHOUSER: Your Honor, at this time I would move to admit Exhibits No. 41, 42, 43 and 54 for purposes of the offer of proof and I have no additional questions for this witness at this time.

THE COURT: Okay. Those exhibits are admitted for the limited purposes of the offer of proof.

Any questions?

MR. BAYLES: Your honor, I have a few questions, but since this is an offer of proof, and since we are now on the record for the first time, I think I have to state I am not prepared to significantly cross-examine this man. This case is nine years old. The rule -- this petition has been pending for a year.

Now, we have first received this man's report about a week ago. I am not prepared to cross-examine him because I haven't had an opportunity to consult with an expert. We haven't been able to explore what this man has to say, and I just think this is enormously unfair to us to have this gentleman and this testimony presented even under the auspices of an offer of proof on the last day of this hearing when we haven't had an opportunity to obtain like comparisons and some testimony, so I am not prepared to engage in significant cross-examination of this man but I do have some questions I think I have to bring out for the purposes of this hearing.

MS. FUNKHOUSER: Your Honor, if I might just respond. Mr. Bayles conducted a very lengthy and, I thought, effective interview of this witness just on Tuesday afternoon. I would beg your indulgence to ask one more question that I neglected to ask.

THE COURT: All right.

Q. BY MS. FUNKHOUSER: Mr. Morris, on the segment that was the latent lift, did you -- was there any significance to you to the fact that one edge seemed to be cut at an angle?

A. Yes, ma'am.

Q. What was that significance?

A. It was significant to me in that it had been done deliberately. It had been cut like the piece of tape had been made like that, which I couldn't figure out how that could be, but it was significant.

Q. Why was that significant?

A. Because that was the only place along the length of tape where that sort of irregular V-shaped phenomenon occurred.

Q. Did that assist you in making the match at that point?

A. Yes, ma'am.

Q. Thank you, Your Honor. I appreciate it.

THE COURT: All right.

MR. BAYLES: I have just one last thing I have to say about the unfairness of this. I understand this is an offer of proof.

THE COURT: Right.

MR. BAYLES: But testimony has come to you and you have -- your are the individual we have to persuade and you have listened to this

man, and we don't have similar testimony to present, and it's because of what the State's done in this case and I think the record needs to be real clear on that. I do have a few questions for Mr. Morris.

CROSS-EXAMINATION

BY MR. BAYLES:

Q. Mr. Morris, when you received -- you received the tape wad out of evidence from the Clerk's office; isn't that correct, sir?

A. No, sir.

Q. Well, you got it from Mr. Anderson who got it from the Clerk's office, correct, sir?

A. I got it from Mr. Anderson. I don't know where Mr. Anderson got it, sir.

Q. And certainly when Mr. Anderson got it and when you got it in particular, the defense certainly wasn't notified that you were going to undertake any experiments with respect to that wad of tape, isn't that true, sir?

A. I don't know, sir.

Q. And in fact, what you received when you got the tape was a configuration of tape that was in approximately the configuration that it was when it was bound on Mr. Shaw's hands; is that right?

A. Yes, sir.

Q. And what you did, without notice to the defense in this case, was destroy that wadded configuration as it was on the victim's hands, forever; isn't that true, sir?

A. Yes, sir.

Q. And there is simply no way in the world that you or our experts or anyone else can put together that configuration as it previously existed. Would that be correct, sir?

A. Probably, yes, sir.

Q. And you knew, looking at the tape, that it had a clerk's exhibit number on it and it was taken from the Clerk of the Superior Court; isn't that correct, sir?

A. I noticed that it had a clerk's exhibit on it and I assumed it was taken from the Clerk of the Superior Court; yes, sir.

Q. And I heard about your expertise and background in criminalistics. I'd like to ask you about adhesive tape, sir. In the 20, 22 years that you have been doing this work, have you ever matched adhesive tape and come to Court and talked about it?

A. Adhesive tape specifically, sir?

Q. Yeah.

A. I don't recall if I have ever matched adhesive tape. I know that I have not testified about matching adhesive tape, although I have testified about matching other kinds of tape.

Q. You testified about duct tape on one occasion; is that true, sir?

A. And since our discussion, I remember that I also testified regarding masking tape, sir.

Q. All right. In some 20 years this is the first time you have ever offered testimony about adhesive tape, the kind we're looking at today. Is that true, Mr. Morris?

A. Yes, sir.

Q. And you understand today when you got this exhibit from Mr. Anderson that the theory of the State's case was that the latent print had to be someplace other than the end of the tape; is that correct, sir?

A. That was my understanding, yes, sir.

Q. And when you took the wad apart, you took it apart strip by strip. Would that be true?

A. Yes, sir.

Q. And each time you removed a strip, the wad got a little bit smaller until finally you had nothing but a line of strips. Is that essentially it?

A. Yes, sir.

Q. And you didn't -- you had access to a camera at that time, didn't you, Mr. Morris?

A. Yes, sir.

Q. But you did not at any point photograph the wad in its progressive state of decomposition. Isn't that true?

A. No, sir.

Q. And so where did the pieces of tape that it came from, including the pieces of tape that you claim fit on either side of the latent, where those pieces of tape were that were on the wad is something about which I really can't examine you because you don't know. Isn't that true, sir?

A. I was able to pretty much fit the latent strip in on the piece of tape on the wad. I just couldn't tell where the latent strip was in relation to either the end of the wad or the end from the roll of tape.

Q. Your claim, Mr. Morris, is that there are two strips on either side of the latent; is that correct?

A. There are two strips that join the latent. There are other strips on either side of it.

Q. The two strips that you say make a joint with the latent came from points on the wad. Agreed on that, correct, sir?

A. No, sir. Yes, sir. Sorry.

Q. And where those strips were that make a joint with the latent on the wad is something you didn't memorialize in any way; isn't that also true?

A. Yes, sir, I did.

Q. You did memorialize that?

A. Yes, sir.

Q. Where on the wad closest to the end of the tape sir -- where was that strip?

A. I wasn't able to tell that. I was concerned with where the latent was along the strip. I can-- I could tell that the latent strip fit together with the piece of tape on the wad, but I wasn't able to determine where the piece of tape that it fit to was in relationship to the length of tape. I knew where it was on the wad.

Q. You were also concerned with seeing that the State's theory was sustain in this case, weren't you, sir?

A. I was interested in determining where the piece of tape with the latent on it fit in relation to the roll of tape and the reassembled tape from the wad. I was not interested in supporting or disproving anyone's theory.

Q. Well, Mr. Morris, because you didn't identify the strips as you took them from the wad, because you didn't make photographs, we're unable to say today where the strips that you contend you claim join the wad or joined the latent actually fit on the wad. Isn't that true, sir?

A. That's correct, sir.

Q. And you had -- if you had made those identification marks, taken those photographs or gotten permission from the Court before you did your testing, those items could have been preserved; isn't that true?

A. I took steps to show where the latent was when the tape was assembled into the wad. That I can -- I have a photograph showing that. My task was to determine where that strip of tape was in relation to the reassembled tape and the roll of tape.

Q. My question, sir, went to the strips that you claim make joints with the latent and to where those strips existed on the wad. Because you didn't photograph them and because you didn't identify them, we don't know where those strips existed in the wad. Isn't that so?

A. That's correct.

Q. And in fact, sir, if your theory is correct as to where you claim the latent existed, there is a missing piece of tape between the latent and the joint closest to or in the direction of the end of the tape. Isn't that true, sir?

A. No, sir.

Q. Isn't there a missing piece of tape on that joint, sir?

A. There is a missing piece of tape on the two segments that join together, but there isn't a missing segment of tape along the joints, sir.

Q. And if your theory is correct, there is a missing piece of tape which would have been part of the latent and also part of the joint; isn't that so?

A. It's not my theory, sir. It's my observation that there is a missing piece of tape.

Q. Your assertion, sir, there is a missing piece of tape. Is that true?

A. My observation, sir.

Q. And the original joints -- there was one joint originally matched up in this case and that was by Mr. Watkins; is that correct?

A. That's my understanding, yes, sir.

Q. And he matched one joint in 1978; is that true?

A. That's my understanding, sir.

Q. And you know of no reason why this test that you conducted, without notice to us, was not undertaken by Mr. Watkins, do you, sir?

A. That's correct, sir.

Q. You have no explanation or justification for the nine year delay in this evidence that you propound to the Court today. Isn't that also true?

A. That's correct, sir.

MR. BAYLES: That's all I have.

THE COURT: Thank you.

MS. FUNKHOUSER: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MS. FUNKHOUSER:

Q. Mr. Morris, when we're talking about a missing piece of tape, what you're referring to is a little V-shaped cut out of the corner of the thing containing a latent in Exhibit No. 43. Is that what you're referring to when you say missing piece of tape?

A. That and another part of the "V" on the piece of tape that is matched to this edge, ma'am.

Q. That's contained in Exhibit No. 41, the length that's there, that's rolled up on there?

A. Yes, ma'am.

Q. So there are no segments missing from the tape, correct?

A. That's correct, ma'am.

Q. And this little V-shaped cut is consistent with a deliberate cut out of the tape?

A. Yes, ma'am.

BEST AVAILABLE COPY

Q. And that little V-shaped cut, whether it is cut on purpose or accidentally, is something that helped, assisted you in making a conclusive match; is that correct?

A. Yes, ma'am.

Q. Mr. Morris, as an experienced criminalist, would the order of disassembling the tape make it impossible for another criminalist to independently review your findings, in your opinion?

A. No, ma'am.

Q. If an independent criminalist had observed you taking it apart and putting it together again, would that have assisted an independent criminalist in any way?

A. It --

MR. BAYLES: Excuse me. He's being asked to talk about what another expert is going to say and it's pure speculation.

MS. FUNKHOUSER: Your Honor, the man has years and years of experience in the field, and I'm just trying to do what I can with my expert to rebut some of the inferences.

THE COURT: All right. The objection is overruled. Go ahead.

Q. BY MS. FUNKHOUSER: Would that have -- first of all, would that have assisted an independent criminalist in any way whatsoever?

A. It would have saved the person time.

Q. Would it have made it impossible for him to reach an conclusion?

A. No, ma'am.

Q. I think you told all of us in an interview, all of us were present at an interview Tuesday, that you sort of figured out on your own the significance of the position of the fingerprint on this tape; is that correct?

A. Yes, ma'am.

Q. Did the significance interfere or contribute in any way to the results you reached?

A. No, ma'am.

Q. At the time you looked at that, that glob of tape, could the conclusion that you reached be exculpatory for Mr. Carriger?

A. Yes, ma'am.

Q. And if it had proved to be exculpatory, would you have been willing to testify for Mr. Carriger?

A. Certain, ma'am.

MS. FUNKHOUSER: No further questions, Your Honor.

THE COURT: All right. May this witness be excused?

MS. FUNKHOUSER: Yes, Your Honor.

THE COURT: All right. Thank you. You may step down. All right. We're going to take our noon recess at this time. We stand at recess until 1:30.

(Whereupon, the noon recess was taken.)

Phoenix, Arizona
December 11, 1987
2:26p.m.

PROCEEDINGS

THE COURT: State v. Paris Carriger, CR 101609. This is the time set for the evidentiary hearing in State v. Paris Hoyt Carriger. You may call your next witnesses.

MR. GRANT: We'd like to call Robert Dunbar for further examination, Your Honor.

THE COURT: All right.

MS. PARKER: Your Honor, Myrna Parker appearing on behalf of Mr. Dunbar.

No. 97-1509

(3)

FILED

APR 23 1998

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, AND
GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

-VS-

PARIS HOYT CARRIGER,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
ATTORNEY GENERAL

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

JOSEPH T. MAZIARZ
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686
ATTORNEYS FOR PETITIONERS

17 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT

I

THE MAJORITY REFUSED TO APPLY THE 28 U.S.C. § 2254(D) PRESUMPTION OF CORRECTNESS TO THE STATE COURT JUDGE'S DETERMINATION OF THE CREDIBILITY OF A WITNESS THE JUDGE PERSONALLY HEARD AND OBSERVED TESTIFY. 2

II

THE MAJORITY WATERED-DOWN AND MISAPPLIED THE *SCHLUP* ACTUAL INNOCENCE STANDARD, AND IGNORED THE "RELIABILITY" REQUIREMENT. 3

III

BRADY DOES NOT REQUIRE THE PROSECUTION TO OBTAIN AND REVIEW POTENTIAL IMPEACHMENT MATERIAL IN THE POSSESSION OF GOVERNMENT AGENCIES NOT INVOLVED IN THE INVESTIGATION OR PROSECUTION OF THE CASE, ESPECIALLY WHERE THE DEFENSE HAS KNOWLEDGE OF THE MATERIAL AND FAILS TO REQUEST IT. 7

CONCLUSION 10

APPENDIX I I-1

APPENDIX J J-1

TABLE OF AUTHORITIES

CASES — PAGE

Battle v. Delo, 64 F.3d 347 (8th Cir. 1995) 4
Brady v. Maryland, 373 U.S. 83 (1963) 1
Cacoperdo v. Demosthenes, 37 F.3d 504 (9th Cir. 1994) 9
Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992) 9
Herrera v. Collins, 506 U.S. 390 (1993) 1
Kyles v. Whitley, 514 U.S. 419 (1995) 7
Marshall v. Lonberger, 459 U.S. 422 (1983) 2
Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980) 7
Morgan v. Bunnell, 24 F.3d 49 (9th Cir. 1994) 9
O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996) 6
Parke v. Raley, 506 U.S. 20 (1992) 2
Schlup v. Delo, 513 U.S. 298 (1995) 1
State v. Carriger, 692 P.2d 991 (1984) 9
State v. Morales, 630 P.2d 1015 (1981) 8
Strickland v. Washington, 466 U.S. 668 (1984) 3
United States v. Burnside, 824 F. Supp. 1215 (N.D. Ill. 1993) 8
United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973) 7
United States v. Morris, 80 F.3d 1151 (7th Cir. 1996) 7
United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) 7

STATUTES

28 U.S.C. § 2254(d) 2–4

RULES

Rule 13.4, Rules of the Supreme Court 1

STATEMENT OF THE CASE

Petitioners stand by the statement of the case set forth in the petition for writ of certiorari. Contrary to Carriger's implication, Petitioners' statement of the facts is not solely dependent upon the trial testimony of Robert Dunbar. It is overwhelmingly supported by the physical and circumstantial evidence. The "facts" set forth by Carriger, obtained verbatim from the majority opinion, contorts the trial evidence by interspersing either subsequent "testimony" by Carriger (at a state post-conviction relief hearing) or merely Carriger's purported theories in an attempt to explain away the evidence establishing his guilt. (Brief in Opposition (B.I.O.) at 1-8) It is a "hopelessly one-sided review of the record" (Appendix B at 17), viewing all of the evidence through a subjective Carriger-colored prism.

REASONS FOR GRANTING THE WRIT

Carriger claims that the en banc decision below is not worthy of certiorari review because it does not conflict with the law of other federal or state courts, does not announce a novel or important rule of federal law, and does not err in its application of the law. Nothing could be further from the truth. As pointed out in the petition for writ of certiorari, the majority below: (1) effectively eviscerated the 28 U.S.C. § 2254(d) presumption of correctness in the Ninth Circuit by refusing to apply it to a trial judge's finding of witness "credibility"; (2) lowered and misapplied the *Schlup*[1] "actual innocence" standard; and (3) held, contrary to every other federal circuit, that, pursuant to *Brady*,[2] a prosecutor must obtain from government agencies *not involved* in the investigation or prosecution of the case potential impeachment evidence *known to the defense*, and hand it over to the defense. Petitioners will briefly respond to the arguments made by Carriger on each issue.[3]

---

1. *Schlup v. Delo*, 513 U.S. 298 (1995).

2. *Brady v. Maryland*, 373 U.S. 83 (1963).

3. Carriger also asks that, if certiorari is granted, the Court also review whether the en banc majority properly applied this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993). However, Carriger failed to file a cross-petition for writ of certiorari and, therefore, that issue is not before the Court. *See* Rule 13.4, Rules of the Supreme Court. Moreover, while Petitioners agree that the majority misapplied *Herrera*, it did so to the benefit of Carriger. (See Petition for Writ of Certiorari at 22 n.7)

I

THE MAJORITY REFUSED TO APPLY THE 28 U.S.C. § 2254(D) PRESUMPTION OF CORRECTNESS TO THE STATE COURT JUDGE'S DETERMINATION OF THE CREDIBILITY OF A WITNESS THE JUDGE PERSONALLY HEARD AND OBSERVED TESTIFY.

Carriger attempts to justify the majority's refusal to apply the 28 U.S.C. § 2254(d) presumption of correctness to the determination of witness "credibility" by utilizing the same methodology employed by the majority in its opinion—attempting to compartmentalize and explain away each individual piece of evidence establishing his guilt by drawing inferences most favorable to Carriger. (B.I.O. at 12–17) This methodology directly conflicts with well-established law. *E.g.*, *Parke v. Raley*, 506 U.S. 20, 35–36 (1992) (federal court must defer to state court on all inferences reasonably drawn from the record); *Marshall v. Lonberger*, 459 U.S. 422, 432–35 (1983) (before rejecting a state court's factual determination, a federal court "must conclude that the state court's findings lacked even 'fair support' in the record, including inferences fairly deducible" from the record). But it is not even necessary to engage in any sort of prolonged review of the record to realize the fallacy of the majority's refusal to apply the 28 U.S.C. § 2254(d) presumption of correctness. The issue is simple—may a federal court disregard a state court judge's determination of the "credibility" of a witness who testified before the state court judge and not the federal court. That is the nut of the issue, and the answer is obvious.

Carriger also attempts to minimize the state trial judge's credibility determination by stating that he "did not hear the trial testimony" and did not base his credibility determination on "Dunbar's demeanor," but on his "analysis of the physical evidence, and Dunbar's motives to lie." (B.I.O. at 12–13) However, Judge Ryan saw and heard Dunbar testify on three different occasions during the course of the post-conviction relief proceeding—when he confirmed his trial testimony, when he recanted his trial testimony, *and* when he recanted his recantation and confirmed his trial testimony. While Judge Ryan took the trouble to explain, in detail, how Dunbar's recantation was "inconsistent with the physical evidence, testimony of other trial witnesses, and his prior testimony" (Appendix D at 3), and that he had a myriad of motives to recant (*id.*), this rejection of the short-lived recantation was based, in large part, on his evaluation of Dunbar's demeanor on the witness stand. (*See Id.* at 2–3, 5)

Carriger, as did the majority below, makes much of the fact that Dunbar's short-lived recantation of his trial testimony "was given without immunity of any kind." (B.I.O. at 12 n 4; see also Appendix A at 30) But

this necessarily renders the recantation *less* reliable. At trial, and when he recanted his recantation at the post-conviction relief hearing, Dunbar was given testimonial immunity; he had admitted that he controlled stolen property (the jewelry). Dunbar did *not* request or obtain any sort of immunity when he recanted because *he knew he was lying* when he said that he and his ex-wife committed the robbery and murder. If, on the other hand, he had been telling the truth, he would have demanded immunity, or would not have so testified.

Carriger, as did the majority, ignores the fact that Dunbar's recantation is inherently incredible because it cannot be believed, unless one believes that Dunbar's ex-wife (*not* Carriger) committed the robbery and murder *with* Dunbar. (See Appendix B at 10–11) And, everybody, Carriger included, agrees that this part of Dunbar's recantation is not believable. (See Appendix B at 10)

No matter how one views the state court record, it is patently clear that the majority below stripped away the presumption of correctness due the state court judge's credibility determination in violation of 28 U.S.C. § 2254(d) and this Court's well-established caselaw. No federal circuit court, to Petitioners' knowledge, has done so before. This Court should grant certiorari review to bring the Ninth Circuit back in line with the rest of the federal judiciary.

II

THE MAJORITY WATERED-DOWN AND MISAPPLIED THE *SCHLUP* ACTUAL INNOCENCE STANDARD, AND IGNORED THE "RELIABILITY" REQUIREMENT.

Carriger erroneously asserts that Petitioners have argued that the *Schlup* actual innocence standard "is the same as the *Herrera* standard." Not so. In fact, Petitioners set forth in detail the *Schlup* standard, pointing out where and how the majority misapplied that standard. (Petition for Writ of Certiorari (P.W.C.) at 14–24) Petitioners did point out that the majority also misapplied the *Herrera* standard, effectively lowering the *Herrera* standard to the *Schlup* standard, and the *Schlup* standard to a *Strickland*[4]-type "confidence in the verdict" standard. (P.W.C. at 22 n.7)

Carriger also claims that Petitioners, and the dissent below, are incorrect in maintaining that the majority "adopted Dunbar's confession as the truth" for purposes of conducting a *Schlup* analysis. (B.I.O. at 11) Neither Petitioners nor the dissent asserted that the majority accepted the recantation as "the truth." Rather, both criticized the majority for accepting

---

4. *Strickland v. Washington*, 466 U.S. 668 (1984).

and giving *any weight* to the recantation in light of Judge Ryan's finding that the recantation was "clearly incredible" (Appendix D at 3). (See Appendix B at 14; P.W.C. at 13) And, the majority most certainly considered and gave weight to Dunbar's recantation in conducting its flawed *Schlup* analysis: "We therefore *consider* Dunbar's confession as at least some evidence supporting Carriger's claims." "*Considering* Dunbar's confession along with the other evidence, which points as directly to Dunbar as to Carriger, we conclude that Carriger has met the *Schlup* standard." (Appendix A at 30, 36, emphasis added) Moreover, at oral argument before the en banc court, Carriger's counsel acknowledged that Dunbar's recantation was "critical" to the *Schlup* claim:

> COURT: Was there evidence from which a trier of fact could find that Carriger was guilty?
>
> MS. YOUNG: No there wasn't. When you look at the way our law defines innocence, and our law—
>
> COURT: The caveat though when you answer that way, the caveat is: Not if Dunbar recants his testimony. Don't you have to add that before you say what you just said?
>
> MS. YOUNG: *Do we need the fact that he took the stand and said I lied at trial? Yes, I think that's critical.*

(Appendix I[5] at 2, emphasis added) Had the majority properly applied the 28 U.S.C. § 2254(d) presumption of correctness to Judge Ryan's credibility determination, it could give "no weight" to Dunbar's short-lived recantation. *See Battle v. Delo*, 64 F.3d 347, 352–53 (8th Cir. 1995) (state court judge's finding that witness' claim that he was the "real killer" was "incredible" binds federal court pursuant to 28 U.S.C. § 2254(d) and that testimony is entitled to "no weight" in conducting a *Schlup* analysis.)

Carriger also claims that the majority did not misapply the *Schlup* standard because it mouthed the words "It is more likely than not that no reasonable juror hearing all of the now-available evidence would vote to convict Carriger beyond a reasonable doubt" (Appendix A at 36). (B.I.O. at 10–11) To be sure, the majority paid lip service to the *Schlup* standard, but, as detailed in the petition for writ of certiorari, the majority clearly *applied* a *Strickland* "confidence in the verdict" type standard. (P.W.C. at 21–23)

---

5. Appendices A through H were submitted along with Petitioners' petition for writ of certiorari. Appendices I and J are appended to this reply brief.

Carriger does not take issue with Petitioners' assertion that the majority simply ignored the reliability requirement of *Schlup*. (See P.W.C. at 14–16) Nor could he. Carriger himself asserts that Dunbar "is a pathological liar." (B.I.O. at 17) Thus, he would be hard pressed to claim that Dunbar's subsequently repudiated recantation is the type of "new *reliable* evidence" necessary to unlock the *Schlup* gateway. *Schlup*, 513 U.S. at 324 (emphasis added). Nor does Carriger take issue with Petitioners' assertion that recanted testimony is inherently *unreliable*. (P.W.C. at 15) Thus, Carriger effectively concedes that the majority below misapplied the *Schlup* standard by omitting its essential element—"reliability."

Regarding the "new reliable evidence" that clearly establishes his guilt (P.W.C. at 16–20), Carriger asserts that the majority "did consider that proffer" but gave it "little weight." (B.I.O. at 19) However, as previously pointed out by Petitioners, the majority mentioned the reconstruction of the tape *only* in the context of shooting down Judge Ryan's credibility finding (Appendix A at 26–27), but did *not* even discuss this highly probative evidence in conducting its *Schlup* analysis (*id.* at 34–37). (P.W.C. at 18)

Carriger states that one of the reasons the majority gave this new reliable evidence "little weight" is because Carriger was unable to "examine" the reconstructed tape. What Carriger fails to mention is that he could not run away from the evidence fast enough when the State presented the criminalist's testimony at the 1987 post-conviction relief hearing. (See Appendix C at 29; Appendix H at 3, 31–32) During the third state post-conviction relief proceeding, Carriger filed an improper *ex parte* motion to have the tape released for examination and the motion was denied because *ex parte* proceedings are not authorized under Arizona law. (Appendix J) Carriger then abandoned the request. Carriger did not request release of the tape again until *after* he filed his successive petition for writ of habeas corpus and Petitioners had answered the petition. (See Appendix C at 26) Petitioners argued, and the district court found, that Carriger had procedurally defaulted on any challenge to the reconstruction of the tape by failing to pursue the issue in state court. (*Id.* at 29.)

Carriger asserts that "another reason" the majority gave the reconstruction of the tape evidence "little weight" was because of an alleged "inconsistency of the expert's testimony as to the location of the latent to the end of the roll of tape." (B.I.O. at 20) However, as pointed out in detail in the petition for writ of certiorari, the criminalist unequivocally testified that Carriger's fingerprint was located "Approximately 21 and a half inches" from the "end of the roll of tape"

(Appendix H at 30). (P.W.C. at 19) The majority's confusion does not change the testimony.[6]

In short, the majority simply ignored the *Schlup* "reliability" requirement in accepting and relying upon Dunbar's repudiated recantation, then turned its back on extremely probative reliable evidence that establishes Carriger's guilt. This is contrary to the very basis upon which this Court decided *Schlup*.

Finally, Carriger implicitly acknowledges that it is an open question whether a *Schlup* showing of "actual innocence" must be linked to a constitutional violation, but claims that "the state's withholding of critical exculpatory and impeachment evidence is intricately tied to his miscarriage of justice evidence." (B.I.O. at 21-22) This is not true. Dunbar's recantation of his trial testimony, and his short-lived claim that he and his ex-wife committed the crimes, has nothing to do with the majority's finding of a *Brady* violation relating to the alleged failure to obtain and disclose to the defense potential impeachment evidence. There has been no allegation, or finding, that the State knowingly presented perjured testimony. Clearly, the majority's (erroneous) *Schlup* finding is not linked to a federal constitutional claim. *See O'Dell v. Netherland*, 95 F.3d 1214, 1246 n.26 (4th Cir. 1996).

---

6. Carriger maintains that the State's expert at trial "stated that he could not determine the location of the latent on the roll of tape." (B.I.O. at 19 n.16) That was because the expert that testified at trial was merely a fingerprint technician and was *not* asked to attempt to reconstruct the tape or otherwise determine where the print had been located in relation to the end of the roll of tape. When, during the second post-conviction relief proceeding, Carriger indicated that he intended to challenge the identification of the print, the State asked a criminalist if he could determine the location of the print in relation to the end of the roll of tape and he did so. (Appendix H at 2-3, 24)

III

BRADY DOES NOT REQUIRE THE PROSECUTION TO OBTAIN AND REVIEW POTENTIAL IMPEACHMENT MATERIAL IN THE POSSESSION OF GOVERNMENT AGENCIES NOT INVOLVED IN THE INVESTIGATION OR PROSECUTION OF THE CASE, ESPECIALLY WHERE THE DEFENSE HAS KNOWLEDGE OF THE MATERIAL AND FAILS TO REQUEST IT.

Carriger takes the position that *Brady* and its progeny require that the prosecution obtain, review, and hand over to the defense any "state records" that might contain potentially exculpatory or impeachment material, even if the state records are in the possession of an agency not involved in the investigation or prosecution of the case *and* even though the defense has *actual knowledge* of the material but fails to request the material. (B.I.O. at 24–25) Carriger's assertion conflicts with this Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), limiting the prosecutor's duty to *Brady* material "known to others acting on the government's *behalf in the case*, including the police." It also directly conflicts with the Seventh Circuit decision in *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996), holding that *Kyles* does *not* impose "a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."

Carriger cites to four cases he claims support the absurd proposition that the prosecution must locate and scour through any government records or files that may contain *Brady* material, regardless of whether the government agency is involved in the investigation or prosecution of the case. (B.I.O. at 24–25) None of those cases even arguably support any such duty. *United States v. Strifler*, 851 F.2d 1197, 1201–02 (9th Cir. 1988) deals with a *trial judge's* review of a witness' probation file for potential *Brady* material; it has nothing to do with imposing upon the prosecution a duty to seek out potential *Brady* material from government agencies. In *Martinez v. Wainwright*, 621 F.2d 184, 186–88 (5th Cir. 1980), a witness' "rap sheet" was in the possession of "the medical examiner's office" *and* an "assistant medical examiner testified for the prosecution at trial." Thus, the medical examiner was, most certainly, involved in the investigation *and* prosecution of the case. In *United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973), the federal government prosecuted two defendants for bribing a *postal office employee*, but refused, *upon defendants' request*, to produce the employee's personnel file. The

district court refused to order the federal government to obtain the personnel file from the post office, and the circuit court remanded with directions that the district court obtain and review the personnel file and determine whether it contained *Brady* material. *Id*. Finally, in *United States v. Burnside*, 824 F. Supp. 1215, 1252–54 (N.D. Ill. 1993), the "lead prosecutor," other "personnel" in the United States Attorney's Office, officers and agents involved in the investigation, *and* "the Warden and other personnel in [a prison]" *all* had actual knowledge that government inmate witnesses were "using illegal drugs" and did not disclose such information to the defense. The court noted, parenthetically, that, even if none of the prosecutors, federal agents, or police officers knew of the witness' drug use, knowledge by the prison warden and other prison personnel would be "attributed to the government" because they worked closely with the United States Attorney's Office on the case. *Id*. at 1254.

Thus, neither Petitioners nor Carriger have located a single case supporting the unprecedented duty the majority has placed on the prosecution. *Brady* and *Kyles* do not place any sort of duty on a prosecutor to ferret out and scour through files or records of a "government agency", not involved in the investigation or prosecution of the case, in search of potential exculpatory or impeachment material. But that is precisely what the Ninth Circuit has done.

Carriger claims that Petitioners have taken a "reversal of the position" taken in 1982 in state court where the State of Arizona argued that Carriger's trial counsel were not ineffective in failing to obtain Dunbar's DOC file because a state statute and state court of appeals opinion (a civil case) prohibited inmates or the public from obtaining an inmate's DOC file. (B.I.O. at 25) However, the State was not successful in that argument, because the Arizona Supreme Court held that a defendant's right to confront witnesses trumped the statute. *State v. Morales*, 630 P.2d 1015, 1017–18 (1981). Moreover, even if the State had been correct, nothing prevented Carriger or his counsel from *requesting* that the prosecution attempt to obtain Dunbar's DOC file, or *requesting* that the trial court order its production.

Regarding Carriger's assertion that his trial counsel did not know that Dunbar had been an informant, that is simply not true. In a letter to trial counsel, Carriger wrote, "Bobby Dunbar was the informant for the state against John Douglas Troutmon for a safe burglary of the National Cash Register Company (about 1968 I think)." (Appendix B at 22) Thus, Carriger and his counsel knew full well that there was a DOC file on

Dunbar *and* that he had been an informant. They simply failed to obtain, or even request, Dunbar's DOC file.[7]

As pointed out in the petition for writ of certiorari, every other circuit to address the issue has held that where the defense has knowledge of the existence of potential exculpatory or impeachment material and fails to take steps to obtain it, *Brady* is not violated. (P.W.C. at 26) Again, the Ninth Circuit stands as a minority of one in holding otherwise.[8]

---

7. The Arizona Supreme Court, after finding that Carriger had procedurally defaulted on the claim, alternatively found that trial counsel were not ineffective in failing to request or obtain Dunbar's DOC file because "it is doubtful it would have altered the result" of the trial. *State v. Carriger*, 692 P.2d 991, 1002 (1984) It noted that most of the information in the file would *not* even be admissible under the Arizona Rules of Evidence to impeach Dunbar. *Id.* at 1000–02. The en banc majority did not concern itself with the threshold question of admissibiity, relying instead upon a quotation from the sole *dissenting* Arizona Supreme Court justice and stating "Dunbar's file need not have been independently admissible to have been material." (Appendix A, at 40–41, 43)

8. Carriger asserts that he also "raised" the claim "that his counsel was ineffective for failing to discover and obtain Dunbar's prison files," and that the majority did not reach this claim because it granted relief on the *Brady* issue. (B.I.O. at 10 n. 3, 29) However, Carriger did *not* raise the claim that trial counsel was ineffective in not obtaining Dunbar's DOC file in his successive habeas petition. Rather, he had raised *that* claim in his first habeas petition and it was found to be procedurally defaulted. *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) Counsel for Petitioners pointed this out to be en banc court at oral argument. (Appendix I at 3–4) Thus, the en banc court had no jurisdiction to review the claim that trial counsel was ineffective in failing to request or obtain Dunbar's DOC file. *See Cacoperdo. v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Morgan v. Bunnell*, 24 F.3d 49, 52 (9th Cir. 1994)

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

JOSEPH T. MAZIARZ
Assistant Attorney General
(Counsel of Record)
Attorneys for PETITIONERS

HC6-070
16431

APPENDIX I

* Excerpts from Oral Argument Before the En Banc Court
March 27, 1997, San Francisco, California

(Tape Counter 109–150)

COURT: What do we do with the state court's, you know the state court listened to this man on the recantation and the unrecantation and said his recantation is not credible, I don't believe it. What do we do with that, we're not sitting *de novo*.

MS. YOUNG: No, that's true, and it typically would be entitled to a presumption of correctness if it was supported by the record. The one thing you do need to know about the state court judge who was hearing this case is that he was not the trial judge, he was not the sentencing judge, so he had nothing to compare it with. He didn't sit at the trial and hear the State stand up and tell the jury that Robert Dunbar may be a burglar, but he is not a liar.

COURT: Is that required under the law?

MS. YOUNG: No, it's not, but I don't think he was in the best, I don't think he was in the best—

COURT: You know, the reason I asked you if that was your best argument, it seemed, you're arguing this case, but it seems to me that you would, even reading the panel's decision, see that there was something that concerned the panel. You said in your opening, and I thought you would start with that as your strongest point, had the Government represented Dunbar to be non-violent, truthful, and truthful?

MS. YOUNG: Did he, did the Government—

COURT: I said, had the Government represented that he was?

MS. YOUNG: Yes, yes.

COURT: Was he?

MS. YOUNG: No, we know he wasn't truthful and we know he was violent, we know he lied to the jury. And then you have to look at this case and realize that the common denominator—

COURT: Maybe your best argument will start something along that line and you would go into it so that when the Government comes up it would rebut it, but you argue the case as you want to argue it and if you want to start saying that the standard's wrong—by any standard there was evidence from which a trier of fact could find that Carriger was guilty, would you agree with that? By any standard?

MS. YOUNG: That by any standard the—

COURT: Was there evidence from which a trier of fact could find that Carriger was guilty?

MS. YOUNG: No there wasn't. When you look at the way our law defines innocence, and our law—

COURT: The caveat though when you answer that way, the caveat is: Not if Dunbar recants his testimony. Don't you have to add that before you say what you just said?

MS. YOUNG: Do we need the fact that he took the stand and said I lied at trial? Yes, I think that's critical.

COURT: Do we have to believe him? We have to believe him when he says that.

MS. YOUNG: Well, that, you don't have to believe him because what you have to know is that this man lies under

oath. We also know he has a history of framing other people and reporting those crimes.

COURT: But the superior court found that the time he lied under oath was when he recanted.

MS. YOUNG: That is what the superior court found and, again, that's entitled to a presumption of correctness, the panel gave it a presumption of correctness, I believe wrongly so. I think there was sufficient evidence to show that, that, you couldn't tell, actually. I don't think you can decide, when does Dunbar tell the truth? But what the panel—

COURT: On paper maybe, but none of us were there looking this man in the eye as he recanted and unrecanted, so what do we do?

MS. YOUNG: Well, what the panel did with that is said, o.k., we will give that the presumption of correctness, but, what flows from that is that Robert Dunbar is unreliable and we can't trust his testimony.

. . .

(Tape Counter 941-963)

MR. MAZIARZ: . . . And one last thing I would like to point out in reference to Judge Reinhardt's question of counsel. There is no claim of ineffective assistance of trial counsel before this court, that was not raised in this successive petition. That was raised in the petition several years ago and was found procedurally barred and was not raised in this petition. The only claims of ineffectiveness—

COURT: Why should it be raised in this petition? It was raised and we said it was procedurally barred. Now, if we decide that is no longer true, why aren't we free to consider it, it was raised before the last en banc court, the last en banc court said we can't consider it because

it's procedurally barred, so why shouldn't we be able to consider it?

MR. MAZIARZ: Because this court's jurisdiction is limited to claims raised in the petition before the district court and that claim was never raised as an independent substantive claim, with the allegation now that now we have cause to get to that abusive or procedurally barred claim. And to claim that counsel was ineffective in not raising it, we know under Coleman just doesn't get there.

COURT: You wouldn't very well expect them to raise it in their third petition when it's been rejected by this court in the second petition, would you?

MR. MAZIARZ: No. I wouldn't, but—

COURT: It would become futile.

MR. MAZIARZ: Right, but, again the court doesn't have jurisdiction to review that substantive claim regardless of any showing of cause and prejudice—

COURT: So, under your theory the petitioner is required to re-raise issues in subsequent petitions if he wishes to preserve the possibility that the court might be willing to reconsider?

MR. MAZIARZ: If he is going to allege cause and prejudice to get to that barred claim, yes.

APPENDIX J

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

RECEIVED	PROCESSED
JAN 18'94	JAN 19 '94
Clerk of the Court	Distr. Clr.

CLERK OF THE COURT

Jan 14, 1994 HON. MICHAEL D. RYAN S. Cummings
Deputy

No. CR 101609

STATE OF ARIZONA

Attorney General
By Joseph T. Maziarz

v.

PARIS HOYT CARRIGER

Denise I. Young
Tempe

Paris Hoyt Carriger
#29425
ASPC Florence
P. O. Box 8600
Florence, AZ. 85232

Appeals

The court reviewed the State's Motion for Order Prohibiting Ex Parte Proceedings. Petitioner's response, and the State's reply were received also. The pleadings were considered along with the files.

Petitioner filed a number of **ex parte** motions requesting orders for release of exhibits, unsealing of documents, etc. Pursuant to the **Arizona Supreme Court's** recent ruling in **State v. Apelt, -Ariz.-, 861 P.2d 634(1993),** the State requests an order prohibiting such motions. The State's request is well-taken. **Apelt, supra,** prohibits such procedures. The reasoning for this prohibition is sound and the federal and other authority

cited by Petitioner are not germane. **Ex parte** Motions are particularly inappropriate in **Rule 32** proceedings. Therefore,

IT IS ORDERED granting the State's Motion for Order Prohibiting **Ex Parte** Proceedings.